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Instruments of Accommodation: The Military Chaplaincy and the Constitution

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INSTRUMENTS OF ACCOMMODATION: THE MILITARY CHAPLAINCY AND THE CONSTITUTION

Ira C. Lupu
Robert W. Tuttle¹

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I. INTRODUCTION

Over the past several years, constitutional issues involving the military chaplaincy have progressed from a low simmer to a rolling boil. After decades of little public attention, stories about the chaplaincy regularly reach the national news,² cases proliferate in the courts,³ and new scholarly articles on the subject appear regularly.⁴ The stories and lawsuits cover a wide array of legal ques-

² Alan Cooperman, *For Gods and Country: The Army Chaplain Who Wanted to Switch to Wicca? Transfer Denied*, WASH. POST, Feb. 19, 2007, at C1; Neela Bannerjee, *Proposal on Military Chaplains and Prayer Holds Up Bill*, N.Y. TIMES, Sept. 19, 2006, at A19; Sonja Barisic, *Navy Chaplain Guilty of Wearing Uniform at Protest*, ASSOCIATED PRESS, Sept. 14, 2006; Alan Cooperman, *Military Wrestles with Disharmony Among Chaplains*, WASH. POST, Aug. 30, 2005, at A1; Laurie Goodstein, *Evangelicals Are Growing Force In the Military Chaplain Corps*, N. Y. TIMES, July 12, 2005, at A1.

³ Veitch v. England, 471 F.3d 124 (D.C. Cir. 2006); Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290 (D.C. Cir. 2006); *In re England*, 375 F.3d 1169 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1152 (2005); Larsen v. U.S. Navy, 486 F. Supp. 2d 11 (D.D.C. 2007); Weinstein v. U.S. Air Force, 468 F. Supp. 2d 1366 (D.N.M. 2006); Adair v. England, 417 F. Supp. 2d 1 (D.D.C. 2006); Larsen v. U.S. Navy, 346 F. Supp. 2d 122 (D.D.C. 2004).

⁴ David E. Fitzkee & Linell A. Letendre, *Religion in the Military: Navigating the Channel Between the Religion Clauses*, 59 A.F. L. REV. 1 (2007); Richard D. Rosen, *Katcoff v. Marsh at Twenty-Two: The Military Chaplaincy and the Separation of Church and State*, 38 U. TOL. L. REV. 1137 (2007); William J. Dobosh, Jr., *Coercion in the Ranks: The Establishment Clause Implications of Chaplain-Led Prayers at Mandatory Army Events*, 2006 WISC. L. REV. 1493; Heather Cook, *Service Before Self? Evangelicals Flying High at the U.S. Air Force Academy*, 36 J.L. & EDUC. 1 (2007); Frank J. Ducoat, New Development, *Self-Executing Irreparable Harm: Chaplaincy of Full Gospel Churches v. England* ("England II"), 8 RUTGERS J. L. & RELIG. 8 (2006); Kenneth J. Schweiker, Note, *Military Chaplains: Federally Funded Fanaticism and the*

tions, from discrimination in the selection and promotion of chaplains,⁵ to constraints on the conduct of chaplains' ministry,⁶ to the constitutionality of the chaplaincy itself.⁷ Legal analysis of these issues has thus far proved somewhat problematic because the military chaplaincy occupies a highly unusual position in constitutional law.

Consider the basic structure of the military chaplaincy. The government establishes professional standards for eligible clergy⁸ and decides which chaplains should be hired, promoted and discharged.⁹ Chaplains engage in government-funded worship, religious instruction and pastoral counseling.¹⁰ Moreover, the government builds the houses of worship in which chaplains conduct religious services, pays for hymnals and liturgical supplies and provides the materials for religious instruction.¹¹ These kinds of expenditures and employment decisions represent the core features of any definition of an "establishment

United States Air Force Academy, 8 RUTGERS J. L. & RELIG. 5 (2006); Steven H. Aden, *The Navy's Perfect Storm: Has a Military Chaplaincy Forfeited Its Constitutional Legitimacy by Establishing Denominational Preferences?*, 31 W. ST. U. L. REV. 185 (2004); William A. Wildhack III, *Navy Chaplains at the Crossroads: Navigating the Intersection of Free Speech, Free Exercise, Establishment, and Equal Protection*, 51 NAVAL L. REV. 217 (2005); Emilie Kraft Bindon, Comment, *Entangled Choices: Selecting Chaplains for the United States Armed Forces*, 56 ALA. L. REV. 247 (2004).

⁵ *Larsen*, 486 F. Supp. 2d at 11; *Chaplaincy of Full Gospel Churches*, 454 F.3d at 290; *Wilkins v. United States*, 2005 U.S. Dist. LEXIS 41268 (S.D. Cal., June 29, 2005), *aff'd*, 2007 U.S. App. LEXIS 12060 (9th Cir. 2007).

⁶ *Klingenschmitt v. Winter*, 2007 U.S. App. LEXIS 2339 (D.C. Cir. 2007); Ken Walker, *USMC Chaplain Who Took a Stand Says Navy Is Retaliating*, BAPTIST PRESS, Jan. 16, 2007, available at <http://www.bpnews.net/bpnews.asp?ID=24777>.

⁷ William T. Cavanaugh, Jr., Note, *The United States Military Chaplaincy Program: Another Seam in the Fabric of our Society?*, 59 NOTRE DAME L. REV. 181 (1993); Christopher Hitchens, *GI Jesus: The Real Problem with Military Chaplains*, SLATE, Oct. 2, 2006, available at <http://www.slate.com/id/2150801>.

⁸ The armed services have adopted the inclusive phrase, "religious ministry professionals," to characterize chaplains, but we will use the more familiar "clergy." See, e.g., U.S. DEP'T OF DEFENSE, DIR. 1304.19, APPOINTMENT OF CHAPLAINS FOR THE MILITARY DEPARTMENTS para. 4 (11 Jun. 2004) [hereinafter DOD DIR. 1304.19].

⁹ DOD DIR. 1304.19, *supra* note 8; U.S. DEP'T OF DEFENSE, INSTR. 1304.28, GUIDANCE FOR THE APPOINTMENT OF CHAPLAINS OF THE MILITARY DEPARTMENTS (11 Jun. 2004) [hereinafter DOD INSTR. 1304.28].

¹⁰ U.S. DEP'T OF ARMY, REG. 165-1, RELIGIOUS ACTIVITIES: CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY, CHAPTER 4, ROLES AND FUNCTIONS OF CHAPLAINS AND CHAPLAIN ASSISTANTS (25 Mar. 2004) [hereinafter AR 165-1]; U.S. DEP'T OF AIR FORCE, POLICY DIR. 52-1, CHAPLAIN SERVICE (2 Oct. 2006) [hereinafter AF POLICY DIR. 52-1]; U.S. DEP'T OF THE NAVY, OPNAV INSTR. 1730.1D, RELIGIOUS MINISTRY IN THE NAVY (6 May 2003) [hereinafter OPNAV INSTR. 1730.1D].

¹¹ See, e.g., U.S. DEP'T OF ARMY, PAM. 165-18, RELIGIOUS ACTIVITIES: CHAPLAINCY RESOURCES MANAGEMENT (21 Jan. 2000) [hereinafter DA PAM 165-18] (describing "how resources such as funds, facilities, manpower, and property are managed, safeguarded, and accounted for").

of religion.” How, then, is the chaplaincy consistent with the Establishment Clause of the Constitution’s First Amendment?

To answer that question, courts and commentators generally turn to one or more of the following paradigms:

- Establishment Clause history—resting on the Supreme Court’s decision in *Marsh v. Chambers*,¹² which upheld the constitutionality of the Nebraska state legislature’s chaplaincy, this paradigm focuses on the long history of the armed services’ chaplaincy as the foundation for its current legitimacy.¹³
- Public funding of religion—drawing from the Court’s decisions from *Everson v. Board of Education*¹⁴ through *Lemon v. Kurtzman*¹⁵ to *Agostini v. Felton*¹⁶ on government aid for religious enterprises, this paradigm examines the various tests used by the Court to determine when government support for religious entities crosses a line into impermissible promotion of religion.¹⁷
- Governmental display of religious messages—looking to the Court’s decisions on government presentation of religious symbols, most prominently *Lynch v. Donnelly*,¹⁸ this paradigm asks whether government-sponsored religious messages reflect unconstitutional “endorsement,” or permitted “acknowledgment,” of religion.¹⁹

Although the historical approach to appraising the chaplaincy is useful and relevant, it is not fully sufficient to answer the questions raised by today’s institution of the chaplaincy. The paradigms of no-funding and no-endorsement—to the extent that they still shape the law—arise from circumstances wholly apart from those which give rise to the chaplaincy and to constitutional questions about its scope and operation. An adequate approach for Establishment Clause analysis of the military chaplaincy requires a different framework—one appropriate to those circumstances.

¹² 463 U.S. 783 (1983).

¹³ *Katcoff v. Marsh*, 755 F.2d 223, 232-33 (2d Cir. 1985).

¹⁴ 330 U.S. 1 (1947).

¹⁵ 403 U.S. 602 (1971).

¹⁶ 521 U.S. 203 (1997).

¹⁷ *Katcoff*, 755 F.2d at 232-33.

¹⁸ 465 U.S. 668 (1984).

¹⁹ *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302 (D.C. Cir. 2006).

Part II of this essay describes and analyzes *Katcoff v. Marsh*,²⁰ the most important decision on the constitutionality of the military chaplaincy. Part III of the essay then turns to our contention that constitutional inquiry into the military chaplaincy should begin from the basic insight, occasionally recognized by courts,²¹ that the military chaplaincy exists for the primary purpose of accommodating the religious needs of military personnel. As such, the chaplaincy bears a family resemblance to other types of religious accommodations, such as exemptions for religious entities from regulation of employment²² or land use;²³ protections for religious exercises of prisoners²⁴ or employees;²⁵ and arrangements for the religious instruction of public school students.²⁶

In a series of decisions spanning the past six decades,²⁷ the Supreme Court has considered Establishment Clause challenges to a variety of religious accommodations. Despite the prevailing general sense of disorder in the universe of Religion Clause jurisprudence,²⁸ the Court's accommodation decisions represent a surprisingly coherent model. These decisions, taken together, suggest that religious accommodations must satisfy four, linked constitutional norms. First, is the accommodation a reasonable effort to relieve a government-imposed burden on religious practice?²⁹ Second, do beneficiaries of the ac-

²⁰ 755 F.2d at 232-33.

²¹ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 226 n.10 (1963) (discussing military chaplaincy as justified by religious needs of military personnel). *See also id.* at 296-98 (Brennan, J., concurring) (same); *id.* at 308-09 (Stewart, J., dissenting) (same); and *Katcoff*, 755 F.2d at 235-37.

²² Title VII of the Civil Rights Act of 1964, § 702; 42 U.S.C. § 2000e-1 (2006) (Religious employer is exempt from prohibition on religion-based discrimination "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities"). *See also Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (rejecting an Establishment Clause challenge to exemption for religious employer from Title VII's bar on religion-based discrimination in employment).

²³ Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc.

²⁴ 42 U.S.C. §§ 2000cc-1.

²⁵ Title VII, § 701(j) (definition of religion includes obligation to make reasonable accommodations for employees' religious exercise). *See also Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (upholding a requirement of reasonable accommodations, but construing the obligation narrowly). *But see Estate of Thornton v. Caldor*, 472 U.S. 703 (1985) (holding unconstitutional, on Establishment Clause grounds, a Connecticut statute that required employers to accommodate employees' need for religious Sabbath observance).

²⁶ *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding "released time" program in which public school students are excused from school to attend religious instruction).

²⁷ *Id.*; *Caldor*, 472 U.S. at 703; *Corp. of Presiding Bishop*, 483 U.S. at 327; *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

²⁸ *See, e.g., Steven G. Gey, Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725 (2006); Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1 (2007).

²⁹ *See infra* notes 201-08 and accompanying text.

commodation participate voluntarily?³⁰ Third, is the accommodation available on a denominationally-neutral basis?³¹ Fourth, does the accommodation impose significant material burdens on third parties?³²

In Parts IV and V, we apply those criteria to constitutional challenges affecting the military chaplaincy. Part IV deals with the constitutional assertion that the chaplaincy as a whole offends the Establishment Clause. We suggest that the institution of the chaplaincy itself should survive challenge, although specific practices of the institution have less certain constitutional footings. We turn to such particular challenges in Part V. There, we consider the services' policies for hiring (accession), promotion and retention of chaplains. We also examine the services' regulation of particular aspects of chaplains' ministry, including the conduct of worship, prayer at official functions and pastoral care. Through our examination of each of these facets of the military chaplaincy, we attempt to show how the Establishment Clause standards for religious accommodations should guide the relevant inquiry and judgments. We believe that consistent application of these standards will intelligently clarify and wisely resolve the current and heated controversies surrounding the military chaplaincy.

II. *KATCOFF V. MARSH*: CHALLENGING THE CHAPLAINCY

A. *The Opinion in Katcoff*

In 1985, the U.S. Court of Appeals for the Second Circuit rejected the first—and to this date, the only—direct constitutional challenge to the military chaplaincy. The lawsuit, *Katcoff v. Marsh*,³³ alleged that the military chaplaincy violated the Establishment Clause because a uniformed, government-financed chaplaincy was not necessary to meet the religious needs of service members.³⁴ The district court dismissed the complaint, and the appellate court partly affirmed and partly reversed.³⁵ After a thorough review of the history and current operation of the military chaplaincy, the court rejected the plaintiffs' claim that a privately funded civilian chaplaincy could fulfill the military's requirements for religious services.³⁶ The court, thus, affirmed the lower court's decision that the chaplaincy, considered in its entirety, does not violate the Constitution.³⁷

³⁰ See *infra* notes 209-10 and accompanying text.

³¹ See *infra* note 211 and accompanying text.

³² See *infra* notes 212-18 and accompanying text.

³³ 755 F.2d 223 (2d Cir. 1985). See generally ISRAEL DRAZIN & CECIL B. CURREY, FOR GOD AND COUNTRY: THE HISTORY OF A CONSTITUTIONAL CHALLENGE TO THE ARMY CHAPLAINCY (1995); Rosen, *supra* note 4.

³⁴ 755 F.2d at 229-30.

³⁵ *Id.* at 237-38.

³⁶ *Id.* at 236-37.

³⁷ *Id.* at 237.

The court remanded the case to the lower court, however, because it concluded that the plaintiffs might be able to show that particular practices of the chaplaincy, such as provision of religious services at domestic installations that could readily be served by civilian chaplains, might violate the Establishment Clause.³⁸

Although the outcome in *Katcoff* seems correct, the appellate court's searching examination of the details of the military chaplaincy came up short when the court turned to application of the governing law. The court began its analysis by citing the Supreme Court's decision in *Marsh v. Chambers*,³⁹ which upheld the practice of legislative prayer because of its "unambiguous and unbroken history of more than 200 years."⁴⁰ Judge Mansfield's opinion for the Second Circuit panel claimed that the military chaplaincy shared a comparable history.⁴¹ The court was not entirely persuaded by the historical justification for the chaplaincy because it then turned to the Supreme Court's three-part Establishment Clause test from *Lemon v. Kurtzman*.⁴² Under *Lemon*, a statute must have a secular purpose, must have a primary effect that does not advance or inhibit religion and must not excessively entangle government and religion. The court determined that the military chaplaincy would "fail to meet the *Lemon v. Kurtzman* conditions,"⁴³ but the court did not treat this failure as dispositive of the chaplaincy's fate under the Establishment Clause.⁴⁴

Instead, the Court said that the Establishment Clause concerns reflected in the *Lemon* test must be balanced against interests arising from both the War Power Clause and the Free Exercise Clause.⁴⁵ The court found in the War Power Clause a requirement of significant judicial deference to Congress in military affairs:

[W]hen a matter provided for by Congress in the exercise of its war power and implemented by the Army appears reasonably relevant and necessary to furtherance of our national defense it should be treated as presumptively valid and any doubt as to its constitutionality should be resolved as a matter of judicial com-

³⁸ *Id.* at 237-38. Before any further hearing on the remand, the plaintiffs abandoned the case. See DRAZIN & CURREY, *supra* note 33, at 203-04; RICHARD G. HUTCHESON, JR., *THE CHURCHES AND THE CHAPLAINCY* 16 (rev. ed., U.S. Government Printing Office 1998).

³⁹ 463 U.S. 783 (1983).

⁴⁰ *Katcoff*, 755 F.2d at 232 (discussing and quoting *Marsh*, 463 U.S. at 792).

⁴¹ *Id.*

⁴² *Id.* (discussing and quoting *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

⁴³ *Id.*

⁴⁴ In this regard, *Katcoff* was following the Supreme Court's lead in the then-recent opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984), which had similarly declared that the *Lemon* standards were guideposts, but were not always controlling. *Lynch*, 465 U.S. at 679.

⁴⁵ *Katcoff*, 755 F.2d. at 233 (discussing the War Powers Clause, U.S. CONST. art. I, § 8; Free Exercise Clause, U.S. CONST. amend. I).

ity in favor of deference to the military's exercise of discretion.⁴⁶

Moreover, the court found the chaplaincy to be a necessary means of avoiding violation of service members' rights under the Free Exercise Clause.⁴⁷ By removing soldiers from their religious communities, the court reasoned, the military has interfered with their opportunity to engage in religious activity, and, thus, might be deemed to have infringed the service members' right to free exercise.⁴⁸ The chaplaincy provides the means through which Congress has insulated the military from liability for such infringements of religious liberty.⁴⁹ Taken together, the court concluded, the concerns reflected in the War Power and Free Exercise Clauses override more traditional principles of nonestablishment.⁵⁰ Thus, the military chaplaincy is justified as a necessary response in "circumstances where the practice of religion would otherwise be denied as a practical matter to all or a substantial number."⁵¹

B. Post-Katcoff Cases and Commentary—The Failure of Conventional Paradigms

Subsequent constitutional challenges to the military chaplaincy have focused primarily on personnel issues and, in particular, the preferences allegedly given to chaplains of certain faith groups over others for purposes of recruitment, promotion and retention.⁵² In deciding these cases, courts have continued with the struggle evident in *Katcoff* to find a coherent methodology for resolving Establishment Clause challenges to the military chaplaincy. For example, a ruling of the D.C. Circuit in *Chaplaincy of Full Gospel Churches v. England* adopts the concept of governmental "endorsement" of religion as its preferred standard for Establishment Clause scrutiny of the chaplaincy.⁵³ In a recent and promising judicial development,⁵⁴ the U.S. District Court for the District of Co-

⁴⁶ *Id.* at 234.

⁴⁷ *Id.* at 234-35.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 235.

⁵¹ *Id.* at 237.

⁵² *Veitch v. England*, 471 F.3d 124 (D.C. Cir. 2006); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290 (D.C. Cir. 2006); *In re England*, 375 F.3d 1169 (D.C. Cir. 2004); *Larsen v. U.S. Navy*, 486 F. Supp. 2d 11 (D.D.C. 2007); *Adair v. England*, 417 F. Supp. 2d 1 (D.D.C. 2006).

⁵³ 454 F.3d 290, 302 (citing *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

⁵⁴ *Larsen*, 486 F. Supp. 2d at 11. Judge Urbina published his opinion in *Larsen* within a few weeks after we delivered this paper at the Symposium. We discuss *Larsen* further in Part IV.A., *infra*.

lumbia relied on a model of accommodation, akin to what we propose, when it ruled that the U.S. Navy did not have to accept chaplain candidates in precise proportion to the Navy's faith demographics.⁵⁵

Legal commentators have generally taken the same route as pre-*Larsen* courts in constitutional assessments of the military chaplaincy. These commentators typically invoke some mix of the three major strands of Establishment Clause jurisprudence—the historical approach in *Marsh*, the three-part *Lemon* test, and the “endorsement” standard from the public display decisions, supplemented by the war powers and free exercise concerns reflected in *Katcoff*.⁵⁶ The resulting analysis tends to reveal the underlying uncertainty with respect to applicable legal standards. Nearly all commentators accept the judgment in *Katcoff*, that the institution survives facial challenge under the Establishment Clause, but their explanation of that judgment and their examination of specific practices of the chaplaincy are deeply unpersuasive because of the difficulty of explaining why any particular standard should be applied in a given context.

This struggle of courts and commentators is understandable. The field of Establishment Clause jurisprudence is littered with tests,⁵⁷ and the military chaplaincy seems to possess elements drawn from the full range of problems that implicate disestablishment principles. What other arm of government finances religious instruction, erects religious displays, and engages in officially sponsored prayer and worship? Unfortunately, the tests appropriate to such contexts, which are most often invoked by courts and commentators in assessments of the military chaplaincy, are ill-suited to this task.

The argument from history, found in *Marsh v. Chambers*,⁵⁸ has been applied by the Supreme Court only to legislative chaplaincies,⁵⁹ and seems to rest on the specific characteristics of religious activity in such chaplaincies. Specifically, the Supreme Court noted that the challenged invocations were brief

⁵⁵ *Id.* at 31-33.

⁵⁶ See Michael J. Benjamin, *Justice, Justice Shall You Pursue: Legal Analysis of Religion Issues in the Army*, 1998-NOV Army Law 1, 2-8; Aden, *supra* note 4, at 188-98; Bindon, *supra* note 4, at 273-83; Cavanaugh, *supra* note 7 at 199-218; Cook, *supra* note 4, at 19-25; Wildhack, *supra* note 4, at 225-29.

⁵⁷ *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) (three-part test for determining impermissible governmental involvement with religion); *Marsh v. Chambers*, 463 U.S. 783, 790-792 (1983) (historically accepted practices withstand Establishment Clause challenges); *Lynch v. Donnelly*, 465 U.S. 668, 687-694 (1984) (O'Connor, J., concurring) (Establishment Clause protects against governmental endorsement of religion); *County of Allegheny v. ACLU*, 492 U.S. 573, 655-679 (1989) (Kennedy, J., concurring in the judgment in part, dissenting in part) (Establishment Clause protects against government-coerced religious exercises); *Agostini v. Felton*, 521 U.S. 203, 230 (1997) (revision of *Lemon* test).

⁵⁸ 463 U.S. at 790-792.

⁵⁹ There has been a recent flurry of lower court decisions about prayer in state and local legislative bodies. See, e.g., *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006); *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005); *Wynne v. Town of Great Falls, S.C.*, 376 F.3d 292 (4th Cir. 2004); *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999); *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998).

and non-sectarian, and were conducted in a setting in which listeners were free to come and go as they pleased.⁶⁰ In the absence of such characteristics, the Court indicated, the historical foundation of the legislative chaplaincy would be insufficient to withstand Establishment Clause scrutiny.⁶¹ The military chaplaincy, however, involves much more extensive religious activity than the ceremonial practice contemplated in *Marsh*. As we discuss later, military chaplains may be called upon to perform ceremonial functions, in some ways akin to legislative prayer.⁶² Such functions, however, do not comprise the core of the chaplains' obligations, which involve the provision of specifically religious services.

Nor is the three-part test from *Lemon*⁶³—or its more recent revision in *Agostini v. Felton*⁶⁴—a particularly useful standard for assessing the military chaplaincy. The questions asked in *Lemon* and *Agostini* focus on the government's involvement in religious activity undertaken with the government's financial assistance.⁶⁵ At first glance, the chaplaincy would seem to fall within this ambit because the government does spend money on the chaplaincy. But the analytic focus of *Lemon* and *Agostini* is quite different. Through the purpose and effect prongs of the standards derived from those decisions, courts determine whether the government bears responsibility for the religious activity of government-supported, private religious organizations.⁶⁶ Ordinarily, government support does not convert the conduct of a private entity into "state action" for constitutional purposes.⁶⁷ Under the Establishment Clause, however, the government may be held responsible for the religious activities of state-funded private entities, and the *Lemon* and *Agostini* standards are intended to determine when such responsibility is fairly assigned to the government. The *Lemon* and *Agostini* tests, thus, focus on factors peculiarly suited to the relationship between government and private religious institutions, such as the extent of government-imposed safeguards on religious use of funds, the monitoring of compliance with those safeguards and the risks of entanglement between government and religion.⁶⁸ In contrast, the government funds the military chap-

⁶⁰ *Marsh*, 463 U.S. at 793-94.

⁶¹ *Id.* at 790 ("Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns.").

⁶² See *infra* notes 431-34 and accompanying text.

⁶³ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

⁶⁴ 521 U.S. 203, 230 (1997).

⁶⁵ *Lemon*, 403 U.S. at 612; *Agostini*, 521 U.S. at 222-30.

⁶⁶ *Agostini*, 521 U.S. at 230 (An Establishment Clause analysis of government aid to religion is undertaken in order to determine "whether any use of that aid to indoctrinate religion could be attributed to the State.").

⁶⁷ See *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

⁶⁸ *Mitchell v. Helms*, 530 U.S. 793, 844-845, 857-863 (2000) (O'Connor, J., concurring in the judgment) (restating *Lemon-Agostini* test in context of aid to religious schools).

laincy for the specific purpose of delivering religious services, so application of the *Lemon-Agostini* tests seems conceptually misplaced.

The Establishment Clause tests applied in challenges to public displays of religion are equally ill-suited to scrutiny of the military chaplaincy. From *Lynch*⁶⁹ through the Court's most recent decisions in this context, *McCreary County*⁷⁰ and *Van Orden*,⁷¹ the disputes have centered on the question of whether the display reflects a message of government promotion ("endorsement") of religion or mere "acknowledgment" of the historical—i.e., arguably non-religious—significance of the religious display.⁷² The religious content of the military chaplaincy, however, can hardly be deemed a matter of reasonable doubt. The government erects chapels and pays the salaries of chaplains precisely because of the religious significance of such places and people. Attempts by courts and commentators to determine whether practices or policies of the chaplaincy reflect constitutionally impermissible endorsement of religion are thus doomed to failure.⁷³

Perhaps sensing the conceptual inadequacy of these traditional paradigms, the appellate court in *Katcoff* ultimately appealed to two additional constitutional provisions—the grant of War Powers and the Free Exercise Clause—in finding that the military chaplaincy withstood Establishment Clause challenge.⁷⁴ Although reliance on these clauses is understandable, neither supports a credible theory of how and why Establishment Clause interests must give way.⁷⁵ The argument based on the grant of War Powers fails to recognize an essential characteristic of the Establishment Clause. Unlike other provisions of the bill of rights, such as the protections for speech or religious exercise, the Establishment Clause has not traditionally been treated as subject to a "public necessity" limitation.⁷⁶ In other words, the state may not successfully respond to an Establish-

⁶⁹ 465 U.S. 668 (1984).

⁷⁰ *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005).

⁷¹ *Van Orden v. Perry*, 545 U.S. 677 (2005).

⁷² See, e.g., *Lynch*, 465 U.S. at 677 (citing a long list of "illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage"); cf. *id.* at 697 (Brennan, J., dissenting) (nativity scene represents official endorsement rather than acknowledgment of Christianity).

⁷³ As Alexander Bickel wrote years ago in a different context, "No answer is what the wrong question begets" ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 103 (Bobbs-Merrill 1962).

⁷⁴ *Katcoff v. Marsh*, 755 F.2d 223, 223 (2d Cir. 1985).

⁷⁵ This failure of explanation is highlighted in a panel member's partial dissent, objecting to the remand for evaluation of specific practices of the chaplaincy). *Id.* at 238 (Meskill, J., concurring and dissenting).

⁷⁶ Compare *Wisconsin v. Yoder*, 406 U.S. 205, 221-29 (1972) (deciding that a state's interest in compulsory school attendance did not outweigh religious liberty interest of Old Order Amish community in withholding children from school after eighth grade), with *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 704-06 (1994) (after finding that creation of special school district

ment Clause claim by an appeal to the public benefits generated by the challenged religious activity.⁷⁷

With respect to the argument based on the Free Exercise Clause, the court in *Katcoff* significantly overestimated the strength of service members' free exercise rights. The court suggested that the military would be constitutionally required to provide some form of chaplaincy in order to avoid infringing the free exercise rights of soldiers who would be separated from their places and communities of religious worship.⁷⁸ Such an overestimate was understandable in 1985, but not today. In the intervening twenty years, the Court has dramatically restricted the scope of the constitutional protection for Free Exercise Clause. The Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*⁷⁹ refused to extend strict judicial scrutiny to "general rules of neutral applicability" that happen to burden religious exercise.⁸⁰ Virtually all military regulations that hinder service members' religious exercise represent such "general rules," including deployment orders, restrictions on off-base travel and duty schedules. None of these types of regulations specifically target religious practices for disfavor, but all are capable of imposing serious obstacles to religious exercise.

The Religious Freedom Restoration Act⁸¹ may provide service members with some degree of protection for religious practices.⁸² The scope of that protection, however, would likely be limited by the Court's strong deference to military authorities, reflected in *Goldman v. Weinberger*.⁸³ RFRA purports to restore the pre-*Smith* law, of which *Goldman* remains a part, so there is no rea-

for Orthodox Jewish community violates the Establishment Clause, Court does not balance that judgment against state interest in having such a school district).

⁷⁷ See *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301-04 (D.C. Cir. 2006) (Establishment Clause not subject to same balancing tests as other First Amendment rights, and, thus, violation is by definition an irreparable injury for purposes of preliminary injunctive relief).

⁷⁸ In *Katcoff*, 755 F.2d at 234, the court wrote: "Unless the Army provided a chaplaincy it would deprive the soldier of his right . . . under the Free Exercise Clause to practice his freely chosen religion." The court appears to link this obligation with "compulsory" military service, but the draft ended a decade before *Katcoff* was decided, and elsewhere, the court treats the obligation as one owed to all service members, whether volunteers or draftees. But see *Larsen v. United States Navy*, 486 F. Supp. 2d 11, 31-33 (D.D.C. 2007) (ruling that military chaplaincy program is not a mandatory accommodation of service members' free exercise rights, but a permissive accommodation of service members' free exercise interests).

⁷⁹ 494 U.S. 872 (1990).

⁸⁰ *Id.* at 878-82.

⁸¹ 42 U.S.C. § 2000bb. RFRA still applies in full force to the federal government. The Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), held RFRA unconstitutional as applied to the states because the Act exceeded the powers of Congress under the 14th Amendment.

⁸² *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (applying RFRA to the federal government).

⁸³ 475 U.S. 503 (1986). In *Goldman*, the Court refused to require the military to accommodate an officer's religious interest in wearing a yarmulke.

son to believe that RFRA protects free exercise rights in the military any more than the First Amendment does.⁸⁴

The reliance in *Katcoff* on free exercise interests places the constitutional analysis in the appropriate framework, as does the court's decision to remand the case for determination of the practices "reasonably necessary" to meet service members' religious needs.⁸⁵ What the court lacked, however, was a model of Establishment Clause review that more directly addressed the issues raised by a government program that purports to address specific religious needs. Such a model does exist, although in 1985 it was far less developed in the Supreme Court's Establishment Clause jurisprudence than it is today.⁸⁶ Over the past six decades, the Supreme Court has decided a significant number of cases involving Establishment Clause challenges to governmental "accommodations" of religious practices otherwise burdened by the government. After a brief survey of these decisions, we sketch out the model of Establishment Clause analysis that they embody.⁸⁷

III. THE GOVERNING PRINCIPLES OF RELIGIOUS ACCOMMODATION

A. *The Leading Decisions on Accommodation of Religion*

The concept of accommodation first appears in the Court's 1952 decision, *Zorach v. Clauson*,⁸⁸ which upheld a program of "released time" religious

⁸⁴ Moreover, the court in *Katcoff* suggested that service members' free exercise rights might offset possible Establishment Clause violations. Even if that were so, which we doubt, statutory rights under RFRA are not constitutionally based, and would not therefore have the same offsetting force. See *Flores*, 521 U.S. at 508-09 (RFRA exceeds scope of protection accorded by the Free Exercise Clause).

⁸⁵ *Katcoff v. Marsh*, 755 F.2d 223, 237-38 (2d. Cir. 1985).

⁸⁶ Indeed, the three leading Supreme Court decisions on religious accommodations appeared in the four years immediately following the appellate court decision in *Katcoff*. *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985); *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Tex. Monthly v. Bullock*, 489 U.S. 1 (1989).

⁸⁷ The leading secondary commentary on accommodations includes Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793 (2006); Lisa Schultz Bressman, *Accommodation and Equal Liberty*, 42 WM. & MARY L. REV. 1007 (2001); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1. One of the co-authors of this article has taken a generally negative view of religion-specific accommodations. See Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991). Both of Professor Lupu's anti-accommodation articles, however, are like Professor Bressman's article in that they have criticized those accommodations that single out religion for favored treatment. The military chaplaincy does not fit that description because the military similarly responds to the needs of service members for many other kinds of social experiences, including athletics and secular cultural experience.

⁸⁸ 343 U.S. 306 (1952).

instruction that was operated by the New York public schools.⁸⁹ On approval from their parents, schoolchildren were released from public schools in order to receive religious instruction.⁹⁰ The instruction was conducted and funded by a variety of religious institutions and offered outside of the schools.⁹¹ During the period for religious instruction, those students whose parents did not consent to religious instruction remained in school.⁹² Providers of religious instruction informed the school of any student who had been released into this program, but had failed to report for religious instruction.⁹³

Plaintiffs brought an Establishment Clause challenge to the program, arguing that it effectively made the public schools full partners in the enterprise of religious instruction.⁹⁴ The plaintiffs had reason to be optimistic about their claim because four years earlier, the Supreme Court had held unconstitutional a similar program in *McCollum v. Board of Education*.⁹⁵ There, the Supreme Court enjoined a program under which teachers of religion, representing a variety of faiths, came to the public schools for one period each week.⁹⁶ Parents could elect for their children to receive instruction from a specific teacher; those students who were not enrolled in religious instruction remained at school (but typically were not given alternative instruction during the period).⁹⁷ By a vote of 8-1, the Court ruled that the program violated the Establishment Clause through its conferral of support, both material and otherwise, on religious education.⁹⁸

In *Zorach*, however, a 6-3 majority rejected the Establishment Clause challenge, and upheld the New York released time program.⁹⁹ The two programs are, however, distinguishable: in the Illinois scheme, the teachers of religion used public school classrooms and were screened by school personnel, while the New York religion classes took place outside the schools and generally involved less school supervision.¹⁰⁰ The major conceptual difference between the cases is Justice Douglas's introduction of the idea of accommodation. Although the Court's opinion is best known for Douglas's comment, "We are a

⁸⁹ *Id.* at 312-14.

⁹⁰ *Id.* at 308. The procedures and forms for parental approval are detailed in the lower court opinion in the case *Zorach v. Clauson*, 99 N.Y.S.2d 339, 340-43 (N.Y. Sup. Ct. 1950).

⁹¹ *Zorach*, 343 U.S. at 308 n.1.

⁹² *Id.* at 321 (Frankfurter, J., dissenting) (discussing requirement that non-participating students remain in school during released time religious instruction).

⁹³ *Id.* at 308.

⁹⁴ *Id.* at 309-10.

⁹⁵ 333 U.S. 203 (1948).

⁹⁶ *Id.* at 207-12.

⁹⁷ *Id.* at 207-09, 207 n.2.

⁹⁸ *Id.* at 210-12.

⁹⁹ *Zorach v. Clauson*, 343 U.S. 306, 306 (1952).

¹⁰⁰ *Id.* at 311-12, 315.

religious people whose institutions presuppose a Supreme Being,”¹⁰¹ the rest of that paragraph holds a more enduring legacy of the decision. We quote at length from the relevant portion of Douglas’s majority opinion:

When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups

. . . .

. . . In the *McCullum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the *McCullum* case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people.¹⁰²

The concept of accommodation, thus, grows from a fairly common meaning of the term—to make room for something within a schedule. The schedule, of course, was the public school day, and the Court’s reasoning started with the basic assertion that schools regularly release individual students for religious observances as requested by their parents.¹⁰³ The schools should be free to do the same on a larger scale, releasing not just isolated students but any whose parents wished their children to receive such instruction. By making room in the schedule, the government opened an opportunity for individuals to choose to engage in religious activity.¹⁰⁴ Thus, the government’s role was responsive to parental need, rather than motivated by the state’s own agenda in support of religious instruction.¹⁰⁵ The state acted to facilitate private religiosity, rather

¹⁰¹ *Id.* at 313. At the time, Justice Douglas was considering—not for the first time—a run for the presidency. See BRUCE ALAN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 212-32 (2003).

¹⁰² *Zorach*, 343 U.S. at 313-15.

¹⁰³ *Id.* at 313.

¹⁰⁴ *Id.* at 311.

¹⁰⁵ *Id.* at 313.

than to offer religious content of the state's own devising.¹⁰⁶ Moreover, the program was formally open to all faiths.¹⁰⁷

The Court's opinion leaves much to be desired. Not once did the Court address the question of why parents need this particular accommodation to provide their children with religious instruction. Presumably, the length of the school day did not preclude religious instruction before or after regular classroom hours. Perhaps parents and children were not as likely to make use of their non-school time for religious education.¹⁰⁸ In dissent, Justice Jackson asked why the school day could not simply be shortened, and such children as were willing could attend religious instruction.¹⁰⁹ He then provided the answer: "But that suggestion is rejected upon the ground that if they are made free many students will not go to the Church."¹¹⁰ Seen from that perspective, the released time program functions more as a public stimulus and enforcement mechanism for religious education.¹¹¹

The Court's opinion also demonstrated a complete lack of interest in the experience of students who do not attend religious instruction during the designated period. It noted only that students were not "forced" to participate in religious instruction.¹¹² As Frankfurter argued in dissent, the school may indeed close its doors during the period of religious instruction, but "they are closed upon those students who do not attend the religious instruction, in order to keep them within the school."¹¹³ The obligation to remain in school, Frankfurter asserted, imposed a burden on non-participating schoolchildren.¹¹⁴ The children faced a choice—they could remain in school for extra work, or at least extra time in "captivity," or they could agree to participate in religious instruction.¹¹⁵ This choice, Justice Frankfurter suggested, raised the significant possibility that the state had established religion through its released time program.¹¹⁶

¹⁰⁶ *Id.* at 314.

¹⁰⁷ *Id.* at 309 n.1.

¹⁰⁸ *Id.* at 323 (Frankfurter, J., dissenting).

¹⁰⁹ *Id.* at 324 (Jackson, J., dissenting).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 318 (Black, J., dissenting). A student enrolled in religious instruction who failed to appear without excuse would be truant, and would be in violation of the state's compulsory attendance law. *Id.* at 308, 309 n.1.

¹¹² *Id.* at 311-12 (majority opinion).

¹¹³ *Id.* at 321 (Frankfurter, J., dissenting).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* (arguing that the Court failed to consider possible coercion of students). In his dissent, Justice Jackson made essentially the same argument against the released time plan as Justice Frankfurter. Because the state releases from "captivity" only those students who are willing to receive religious instruction, and consequently "imprisons" those who are unwilling to receive religious instruction, the state has unconstitutionally exercised its coercive powers in support of religion. *Id.* at 323-25 (Jackson, J., dissenting). Professor Lupu's experience with the program as

Whether or not the Court correctly decided *Zorach*, the decision created the seed of the accommodation concept. *Zorach* contains within it both the concept's justification¹¹⁷ and, as explicated in the dissenting opinions, the limitations later to be imposed on it.¹¹⁸ Pushing back against the *Everson* decision's embrace of a strongly separationist interpretation of the Establishment Clause,¹¹⁹ *Zorach* advanced an alternative history of the Clause that had first been articulated in Justice Reed's *McCullum* dissent.¹²⁰ Under this history, the founders' decision not to establish a national church went hand-in-hand with a general agreement that religion deserves great respect in the polity.¹²¹ Such respect includes official recognition of the importance of religion to the citizenry, made concrete in Thanksgiving proclamations, legislative prayers and other public ceremonies that include mention of the divine.¹²² Accommodation of religion played, and continues to play, a central role in this alternative to strict separationism. Through accommodation of religion, the government demonstrates respect for the religious lives of its people.

In *School District of Abington Township v. Schempp*,¹²³ the Court held unconstitutional the practice of prayer and devotional Bible reading in public schools. For our purposes, the case is important because Justice Brennan's concurring opinion offers the first sustained exploration of the concept of accommodation.¹²⁴ Those who defended the practice of prayer and Bible reading had argued that the practice should be upheld under *Zorach* as a permissible ac-

a child in upstate New York confirms this experience of "imprisonment." Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 743-44 n.4 (1992).

¹¹⁷ *Zorach*, 343 U.S. at 311-15.

¹¹⁸ *Id.* at 315-25 (dissenting opinions).

¹¹⁹ See generally *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-16 (1947) (reviewing the history of disestablishment in colonial era and early republic). See also *id.* at 33-42 (Rutledge, J., dissenting) (focusing on debates in Virginia over disestablishment).

¹²⁰ *Zorach*, 343 U.S. 306, 312-14. See also *McCullum v. Bd. of Educ.*, 333 U.S. 203, 244-48 (1948) (Reed, J., dissenting).

¹²¹ *Zorach*, 343 U.S. at 313-14.

¹²² *Id.* at 312-13. The paradigmatic statement of this "alternative" Establishment Clause history can be found in the dissenting opinion of Justice Rehnquist in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting). See generally ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (Lambeth Press 1982) (challenging separationist interpretation of constitutional history).

¹²³ 374 U.S. 203 (1963). We omit discussion here of *McGowan v. Maryland*, 366 U.S. 420 (1961), in which the Supreme Court rejected an Establishment Clause challenge to the Maryland Sunday closing laws. The Court's decision in *McGowan* touched on the idea of accommodation, but the opinion depended almost entirely on the judgment that the originally religious purposes of Sunday closing laws had been transformed into secular grounds for a uniform day of rest. *Id.* at 446-52. The Court reasoned that the choice of Sunday as the day of rest merely recognizes and coordinates the habits of the vast majority of people. *Id.* at 451-52.

¹²⁴ *Schempp*, 374 U.S. at 294-305 (Brennan, J., concurring).

commodation of the religious needs of students enrolled in public schools.¹²⁵ In the majority opinion, written by Justice Clark, the Court focused on the government's obligation of religious neutrality, which the Court deemed to have been violated by the Bible reading and prayer.¹²⁶ Through the schools' use of the Lord's Prayer and King James Version of the Bible, the Court held that the government was intentionally advancing one set of religions over others, and also advancing religion over non-religion.¹²⁷

In his concurring opinion, which was quoted at length in *Katcoff*,¹²⁸ Justice Brennan directly confronted the school officials' defense of the challenged practice as an accommodation of religion.¹²⁹ Brennan used the military chaplaincy as the paradigmatic form of a permissible accommodation, and against that form he contrasted prayer and Bible reading in schools.¹³⁰ His concurrence noted several features of the military chaplaincy that save it from unconstitutionality. First, the chaplaincy responds to a significant burden on service members' free exercise of religion; the source of this burden is their isolation from ordinary opportunities for civilian worship.¹³¹ Second, the chaplain's religious services are provided only to those who ask to receive them, and those who do not seek religious services suffer no penalty for that decision.¹³² Brennan reasoned that the schools' practice of prayer and Bible reading lacked either of those characteristics.¹³³ Students attending public schools suffer no material isolation from ordinary opportunities for worship or religious instruction so the government cannot plausibly claim that its religious exercises are designed to alleviate a government-imposed burden.¹³⁴ Moreover, the religious experience is provided to all students, not just to those who choose to receive it.¹³⁵ Taken together, these features of the challenged religious exercises suggest that they

¹²⁵ Justice Stewart's dissent develops this argument at some length; he contends that the practice should be upheld because it permissibly advances the free exercise interest of parents "who affirmatively desire to have their children's school day open with the reading of passages from the Bible." *Id.* at 312-13 (Stewart, J., dissenting).

¹²⁶ *Id.* at 223-25 (majority opinion).

¹²⁷ *Id.* at 224 (noting that the permission to use the "Catholic Douay version" for readings did not save the practice from unconstitutionality because the practice inevitably places the power of the state behind a particular understanding of religion).

¹²⁸ *Katcoff v. Marsh*, 755 F.2d 223, 234-35 n.4 (2d Cir. 1985) (quoting *Schempp*, 374 U.S. at 296-98 (Brennan, J., concurring)).

¹²⁹ *Schempp*, 374 U.S. at 294-304 (Brennan, J., concurring).

¹³⁰ *Id.* at 298-99.

¹³¹ *Id.* at 297-98.

¹³² *Id.* at 298.

¹³³ *Id.* at 298-99.

¹³⁴ *Id.* at 299.

¹³⁵ *Id.* at 299-300 (comparing school students to legislators, who are free to absent themselves from legislative prayer if they so choose, whereas schoolchildren do not enjoy that same freedom to leave without penalty, "direct or indirect").

were intended to further religious purposes of the government rather than to accommodate the religious needs of schoolchildren.¹³⁶

Although *Zorach* and *Schempp* predate *Katcoff*, the Supreme Court's most significant decisions involving religious accommodation did not appear until the two years immediately following the *Katcoff* decision.¹³⁷ From 1985 to 1987, the Court considered the scope of government accommodation of religion in four cases: *Wallace v. Jaffree*,¹³⁸ *Estate of Thornton v. Caldor*,¹³⁹ *Corp. of the Presiding Bishop v. Amos*,¹⁴⁰ and *Texas Monthly v. Bullock*.¹⁴¹ Although the four cases involve quite disparate legal contexts—from school prayer to employment to taxation—each represents an Establishment Clause challenge to a government program that purported to relieve a burden imposed on religious activity.

In three of the decisions, *Wallace*, *Estate of Thornton*, and *Texas Monthly*, the Court rejected the government's claim that the challenged program was a constitutionally permissible accommodation of religion.¹⁴² *Wallace* involved Alabama's moment of silence provisions, which permitted public school teachers to "announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in."¹⁴³ A previously enacted Alabama statute also contained a moment of silence provision, which used essentially the same language except that it omitted the reference to voluntary prayer.¹⁴⁴ The Court held that the newly enacted provision was unconstitutional because it lacked a plausible secular purpose.¹⁴⁵ The prior moment of silence provision fully achieved the state's expressed purpose of accommodating students' private, voluntary religious exercise.¹⁴⁶ Such accommodations, the Court's opinion implied, must be directed toward, and limited to, the facilitation

¹³⁶ *Id.* at 299.

¹³⁷ Between *Schempp* and *Katcoff*, the Court decided *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). *Walz* upheld New York State's tax exemption for real estate owned and used for religious purposes by religious organizations. Although the opinion uses the language of accommodation, see 397 U.S. at 673, the exemption applied equally to secular non-profit organizations, and was not designed to relieve a distinctive burden on religious entities. The *Walz* decision, thus, plays a relatively insignificant part in the law of permissive accommodation because the exemption it upheld is neither religion-favoring nor an affirmative provision of resources to religious entities.

¹³⁸ 472 U.S. 38 (1985).

¹³⁹ 472 U.S. 703 (1985).

¹⁴⁰ 483 U.S. 327 (1987).

¹⁴¹ 489 U.S. 1 (1989).

¹⁴² *Wallace*, 472 U.S. at 38; *Estate of Thornton*, 472 U.S. at 703; *Texas Monthly*, 489 U.S. at 1.

¹⁴³ *Wallace*, 472 U.S. at 40 n.1 (citing ALA. CODE § 16-1-20.1 (Supp. 1984)).

¹⁴⁴ *Id.* at 58-59.

¹⁴⁵ *Id.* at 59-60.

¹⁴⁶ *Id.* at 59.

of voluntary private religious activity.¹⁴⁷ Seen in that light, the subsequent enactment was superfluous, and was properly understood to promote prayer as the state-preferred way to use the moment of silence.¹⁴⁸

In her concurring opinion, Justice O'Connor further elaborated on the difference between a permissible accommodation and the Alabama statute struck down by the decision.¹⁴⁹ A moment of silence provision, O'Connor said, may withstand constitutional scrutiny because the religious substance—if any—of the student's meditation is supplied entirely by the student.¹⁵⁰ The government may not specify any particular content of the meditation, or even that the state prefers the students to use the time for religious meditation.¹⁵¹ The shift from facilitation to promotion of religious exercise is determinative. So long as the state allows the student to choose whether the moment will be used for religious exercise and does not steer the student toward such exercise, the accommodation satisfies the Establishment Clause.¹⁵² O'Connor concluded that Alabama's subsequent enactment of the statute that authorized "voluntary prayer" moved the state from accommodation to promotion of religion.¹⁵³

In *Estate of Thornton v. Caldor*,¹⁵⁴ the Supreme Court considered an Establishment Clause challenge to a Connecticut statute that required employers to accommodate their employees' religious desire to observe a Sabbath.¹⁵⁵ The statute provided that, "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal."¹⁵⁶ When Thornton, an employee, refused to work on his Sabbath, he was demoted to a lower position and he then resigned.¹⁵⁷ Invoking the Connecticut Sabbath accommodation statute, Thornton filed a grievance against Caldor, his employer.¹⁵⁸ Caldor defended by challenging the constitutionality of

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (citation omitted):

Appellants have not identified any secular purpose that was not fully served by § 16-1-20 before the enactment of § 16-1-20.1. Thus, only two conclusions are consistent with the text of § 16-1-20.1: (1) the statute was enacted to convey a message of state endorsement and promotion of prayer; or (2) the statute was enacted for no purpose. No one suggests that the statute was nothing but a meaningless or irrational act.

¹⁴⁹ *Id.* at 67-74 (O'Connor, J., concurring).

¹⁵⁰ *Id.* at 72.

¹⁵¹ *Id.* at 73.

¹⁵² *Id.* at 73, 75-77 (O'Connor, J., concurring).

¹⁵³ *Id.* at 76-79.

¹⁵⁴ 472 U.S. 703 (1985).

¹⁵⁵ *Id.* at 707-08.

¹⁵⁶ *Id.* at 706 (quoting Conn. Gen. Stat. § 53-303e(b) (1985) (footnote omitted)).

¹⁵⁷ *Id.* at 706-07.

¹⁵⁸ *Id.*

the statute, arguing that the statute had the primary effect of advancing religion, and, thus, violated the Establishment Clause.¹⁵⁹

The Supreme Court agreed with the employer and held the statute unconstitutional.¹⁶⁰ *Caldor* is different from the earlier accommodation cases because the statute relieved its beneficiaries of a burden imposed by private parties rather than by the government.¹⁶¹ In striking down the statute, the Court focused on the statute's "absolute and unqualified" grant of an accommodation to sabbatarians.¹⁶² The statute disregarded employers' attempts to make reasonable accommodations, the economic costs of employers' compliance, and the burdens such accommodations might impose on fellow employees.¹⁶³ By categorically preferring the religious exercise of sabbatarians to the interests of employers and fellow employees, the Court said, the statute crossed the line from permissible accommodation to impermissible government favoritism for religion.¹⁶⁴ A statute that required employers to make reasonable accommodations, such as Title VII, would not suffer from the same defect because it simply required employers to take employees' religious needs into account alongside other legitimate interests.¹⁶⁵

In *Texas Monthly v. Bullock*,¹⁶⁶ the Court held unconstitutional a Texas statute under which religious publications were exempted from a sales tax that was otherwise imposed on all publications.¹⁶⁷ The Court held that the exemption, limited only to religious publications, violated the Establishment Clause because it lacked a plausible secular purpose.¹⁶⁸ The state claimed that the exemption was necessary to protect the free exercise interests of religious publishers, but the Court determined that the exemption failed to meet an essential requirement for a constitutionally permissible accommodation of religion: the

¹⁵⁹ *Id.* at 707.

¹⁶⁰ *Id.* at 708, 710-11.

¹⁶¹ *Caldor* thus resembles *TWA, Inc. v. Hardison*, 432 U.S. 63 (1977), in which the Court upheld the constitutionality of the requirement in Title VII of the 1964 Civil Rights Act that private employers reasonably accommodate the religious practices of employees, *id.* at 81-83, but construed the accommodation requirement to demand only *de minimis* accommodations by employers. *Id.* at 84-85. Anything more demanding, the Court suggested, would impose an unconstitutionally severe burden on employers to subsidize the religious experiences of their employees. *Id.*

¹⁶² *Caldor*, 472 U.S. at 709.

¹⁶³ *Id.* at 708-10.

¹⁶⁴ *Id.* at 710-11.

¹⁶⁵ *Id.* at 711-12 (O'Connor, J., concurring).

¹⁶⁶ 489 U.S. 1 (1989). For a recent decision applying the principles of *Texas Monthly*, see *Budlong v. Graham*, 488 F. Supp. 2d 1252 (N.D. Ga. 2007) (Georgia's sales and use tax exemptions for Bibles and other specified religious literature violate the Free Press Clause of the First Amendment because they single out religious literature for favored treatment.). This was the ground for Justice White's concurring opinion in *Texas Monthly*, 489 U.S. at 25-26 (White, J., concurring in the judgment).

¹⁶⁷ *Texas Monthly*, 489 U.S. at 5.

¹⁶⁸ *Id.* at 14-16.

accommodation did not relieve any distinctive burden on religion.¹⁶⁹ The sales tax may have added slightly to the price of the religious materials to be paid by the consumer, and, therefore, may have reduced sales at the margin.¹⁷⁰ But imposition of the tax did not make it especially difficult or unlawful to sell the literature.¹⁷¹ Nor did payment of the tax proceeds to the state conflict with the tenets of any organization or group that was engaged in such transactions.¹⁷² Without such a burden of significant lost sales or conflict with religious principles as its foundation, the exemption for religious publications represented an unconstitutional benefit to religion.¹⁷³

In this quartet of accommodation decisions that appeared in the late 1980s, the Court upheld the challenged accommodation only once.¹⁷⁴ *Corp. of the Presiding Bishop v. Amos*¹⁷⁵ involved a challenge to the exemption for religious employers, found in Title VII of the Civil Rights Act, from the prohibition on religion-based employment discrimination.¹⁷⁶ An employee who had been discharged from his position as building engineer of a religious facility owned by the Mormon Church filed suit against the employer alleging religious discrimination.¹⁷⁷ He claimed that the complete exemption of religious employers from the ban on religious discrimination violated the Establishment Clause by giving a special benefit to religious employers.¹⁷⁸ The Court rejected the challenge, and held that the exemption was a permissible accommodation of religion.¹⁷⁹

In unanimously reaching this conclusion, the Court made two findings. First, it determined that the exemption alleviated a distinctive burden on religious employers, for whom the restriction on religion-based employment was more likely to affect core aspects of the enterprise than such restrictions imposed on a secular employer.¹⁸⁰ Second, the Court rejected the plaintiffs' argument—formally similar to the one made in *Wallace v. Jaffree*—that a prior statutory regime offered a sufficient accommodation for religious employers.¹⁸¹ The Court disagreed and found that Congress had made a reasonable judgment that the prior Title VII exemption, which included only employees responsible

¹⁶⁹ *Id.* at 17-19.

¹⁷⁰ *Id.* at 24-25.

¹⁷¹ *Id.* at 24.

¹⁷² *Id.* at 18-19.

¹⁷³ *Id.* at 17-18.

¹⁷⁴ *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 329 n.1 (quoting Civil Rights Act of 1964 § 702, 42 U.S.C. § 2000e-1).

¹⁷⁷ *Id.* at 330-31.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 336-38.

¹⁸⁰ *Id.* at 338.

¹⁸¹ *Id.* at 335-36. *See also* *Wallace v. Jaffree*, 489 U.S. 38, 58-60 (1985).

for the employer's religious message, was administratively and substantively insufficient to alleviate the burden on religious employers.¹⁸² Whether *Amos* is viewed as a religion-favoring accommodation,¹⁸³ or as we prefer, an accommodation that equalizes the position of religious organizations with their secular counterparts,¹⁸⁴ *Amos* represents a high-water mark for the law of permissive accommodation.

Over the last twenty years, the Court has considered two additional challenges to religious accommodations: *Board of Education of Kiryas Joel v. Grumet*¹⁸⁵ and *Cutter v. Wilkinson*.¹⁸⁶ In *Kiryas Joel*, the Court held unconstitutional a New York statute that created a special school district for a village occupied only by members of a particular religious group, the Satmar Hasidim.¹⁸⁷ The community had requested the state legislature to create such a public school district, so that its disabled students could get the benefit of state assistance.¹⁸⁸ The Court determined that the statute alleviated a distinct burden on the religious practice of the community by freeing its disabled children from attending school in a nearby town, where they experienced significant distress because of their different dress and customs.¹⁸⁹ The statute, nevertheless, violated the Establishment Clause because the government failed to show that a similar accommodation would have been provided to other religious groups.¹⁹⁰ Moreover, the Court found the accommodation unnecessary, as secular alternatives might have alleviated the community's burden without requiring the creation of the special district.¹⁹¹

¹⁸² *Amos*, 483 U.S. at 336-37.

¹⁸³ See McConnell, *supra* note 87, at 692-93.

¹⁸⁴ The Title VII exemption for religion-based hiring by religious organizations is an equalizer because other cause-oriented organizations remain entirely free to discriminate in favor of those who subscribe to their cause. For example, political parties are free to hire only those who are politically loyal to the party, feminist organizations may insist that their employees be feminists, and so on. Similarly, the inclusion of student religious clubs in the class of student organizations to which public schools must give "equal access" if the schools permit noncurricular clubs represents an accommodation for religious clubs equal to that provided their secular counterparts. The Supreme Court upheld the Equal Access Act, which codified this obligation of public schools, in *Board of Education v. Mergens*, 496 U.S. 226 (1990).

¹⁸⁵ 512 U.S. 687 (1994).

¹⁸⁶ 544 U.S. 709 (2005).

¹⁸⁷ *Kiryas Joel*, 512 U.S. at 696.

¹⁸⁸ The non-disabled students in the Village attended a private, Hasidic academy. *Id.* at 687. At the time, the Court's prior ruling in *Aguilar v. Felton*, 473 U.S. 402 (1985) made it unconstitutional for the state to give the private, religious academy any state aid for the education of disabled children. The Court later overruled *Aguilar* in *Agostini v. Felton*, 521 U.S. 203, 236 (1997).

¹⁸⁹ *Kiryas Joel*, 512 U.S. at 692, 711, 724.

¹⁹⁰ *Id.* at 702-07 (majority opinion).

¹⁹¹ *Id.* at 707-09. These might have included provision for special education in a neighboring public school district, accomplished in a way that addressed the fears of the Satmar Hasidic children. See *id.* at 711-712 (Stevens, J., concurring). See also Martha Minow, *The Constitution and the Subgroup Question*, 71 IND. L.J. 1, 19-23 (1995) (discussing fears of Satmar Hasidic children).

In its most recent foray into the area of religious accommodations, the Court rejected a challenge to part of the Religious Land Use and Institutionalized Persons Act (RLUIPA).¹⁹² In its relevant provision, RLUIPA protects the religious exercise of “institutionalized persons,” including prisoners, by requiring the state to afford reasonable accommodations to the sincere religious practices of such persons.¹⁹³ The State of Ohio claimed that RLUIPA violated the Establishment Clause by requiring the state to prefer the religious interests of inmates over secular interests of others.¹⁹⁴ A unanimous Court rejected the state’s claim, and found that the statute was a permissible accommodation.¹⁹⁵ Citing *Amos*, the Court determined that the statute responded to a class of distinct burdens on religion caused by the state’s incarceration of those protected by the act.¹⁹⁶

Most importantly, the Court distinguished Ohio’s facial challenge to the statute from potential as-applied challenges that might be brought in the future.¹⁹⁷ The Court ruled that RLUIPA is capable of being administered constitutionally, but is susceptible to as-applied challenges if specific accommodations exceed the scope permitted under the Establishment Clause.¹⁹⁸ The Court said that applications of RLUIPA might violate the Establishment Clause if such accommodations manifested denominational favoritism or imposed significant material burdens on third parties, whether guards or fellow inmates.¹⁹⁹ To ensure that accommodations do not impose such burdens, the Court instructed the lower courts that RLUIPA should be interpreted with appropriate deference to judgments of prison officials about the safety, security and welfare of those within the prison environment.²⁰⁰

B. *Drawing Principles from the Court’s Decisions*

Although the decisions from *Zorach* to *Cutter* have arisen in a wide range of contexts, a set of consistent themes emerges from them. As we elabo-

¹⁹² *Cutter v. Wilkinson*, 544 U.S. 709, 713-14 (2005) (affirming constitutionality of RLUIPA’s provision concerning the religious exercise of persons confined in government institutions, 42 U.S.C. § 2000cc-1(a)(1)-(2)). The provision concerning religious land uses was not before the Court.

¹⁹³ 42 U.S.C. § 2000-cc-1(a)(1)-(2), quoted in *Cutter*, 544 U.S. at 712 (“No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution,” unless the burden furthers “a compelling governmental interest,” and does so by “the least restrictive means.”).

¹⁹⁴ *Id.* at 712, 717-18.

¹⁹⁵ *Id.* at 713-14.

¹⁹⁶ *Id.* at 720-21.

¹⁹⁷ *Id.* at 725.

¹⁹⁸ *Id.* at 722, 725-26.

¹⁹⁹ *Id.* at 722-23.

²⁰⁰ *Id.* at 725-26.

rate below, the Court has relied on four criteria to distinguish permissible from impermissible accommodations.

1. The Accommodation Must Relieve a Significant Government-Imposed Burden on the Private Exercise of Religious Freedom

The challenged accommodations in *Wallace* and *Texas Monthly* failed to meet this criterion, although they failed in subtly different ways. In *Wallace*, the Court determined that any conceivable burden imposed on students by the compulsory school day had been relieved by the previous moment of silence provision, which set aside quiet time for students to use as they chose.²⁰¹ And in *Texas Monthly*, the tax exemption did alleviate a financial burden on the sale of religious publications—payment of the sales tax—but that burden was trivial, and was indistinguishable from the burden the sales tax imposed on non-religious publications.²⁰²

Even if the accommodation responds to a government-imposed burden, however, the accommodation may still fail to satisfy this first criterion if the response is not reasonably tailored to that burden. Although the Court has not required a narrow tailoring of relief to the underlying burden, some reasonable and proportional relationship between the two is required.²⁰³ In his dissenting opinion in *Schempp*, for example, Justice Stewart argued that the practice of prayer and Bible reading accommodated students who were required to attend school, and thus were limited in their opportunities for receiving religious instruction.²⁰⁴ In his concurrence, Justice Brennan expressed skepticism about the existence of any such burden, and indicated that the purported accommodation—government controlled prayer and scripture reading—lacked any reasonable connection to the alleged burden on students.²⁰⁵ In *Kiryas Joel*, the Court focused primarily on the denominational favoritism represented by the accommodation, but it also determined that the state might have found other, constitutionally preferable ways to alleviate the burden imposed on the religious community.²⁰⁶

By contrast, in *Amos*, the Court accorded a measure of deference to Congress in setting the terms for the accommodation of religious employers

²⁰¹ *Wallace v. Jaffree*, 472 U.S. 38, 59-60 (1985). See *supra* notes 143-53 and accompanying text.

²⁰² *Texas Monthly v. Bullock*, 489 U.S. 1, 10-12 (1989). See *supra* notes 166-73 and accompanying text.

²⁰³ See, e.g., *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 335-36 (1987) (assessing the relationship between expanded religious employer exemption under Title VII and the burden imposed on religious employers by the original, narrower Title VII exemption).

²⁰⁴ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 311-13 (1963) (Stewart, J., dissenting). See *supra* notes 123-36 and accompanying text.

²⁰⁵ *Id.* at 299 (Brennan, J., concurring).

²⁰⁶ *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 702-08 (1994).

under Title VII.²⁰⁷ The Court acknowledged that Congress could have—indeed did at one time—provide a narrower exemption for such employers, but the present and broader accommodation, nonetheless, represented a reasonable means of alleviating the government-imposed burden on employers because the narrower exemption had led to incomplete relief from the religious burden of complying with Title VII.²⁰⁸

2. The Accommodation Must Facilitate Private and Voluntary Religious Practices

This criterion may seem obvious, but it illuminates a core aspect of accommodations. At its most basic level, an accommodation provides an opportunity for voluntary, private religious exercise. The government does not specify the content of that religious exercise, or even specify that the opportunity created should be used for religious exercise. Thus, for example, a moment of silence provision sets aside a time in the school day in which students may choose to pray, but the time may equally be used by students to meditate on any topic. The provision at issue in *Wallace* failed on this criterion because it attempted to specify how the moment of silence should be used.²⁰⁹ This criterion is especially important in distinguishing accommodations from other governmental practices involving religion, such as public religious displays, which have sometimes been defended as accommodations.²¹⁰ Such displays are not properly viewed as accommodations because they embody official rather than private choices of religious content.

3. The Accommodation Must Be Available on a Denominationally Neutral Basis

This criterion is related to, and equally fundamental as, the requirement that the religious practice accommodated must be private and voluntary. Through the accommodation, the government provides an opportunity for privately chosen religious practice, but the government does not specify which religions may avail themselves of the accommodation. The requirement of neutrality does not mean that all faiths must find the accommodation equally useful. Some religious communities, for example, may want to participate with public schools in a released-time program for religious instruction, like the one upheld by the Court in *Zorach*, while others might elect not to do so. Some religious prisoners may feel the need to seek accommodations under RLUIPA, while the regimen of prison life may not impose such a need on others. What is crucial,

²⁰⁷ *Amos*, 483 U.S. at 335-36.

²⁰⁸ *Id.*

²⁰⁹ *Wallace v. Jaffree*, 472 U.S. 38, 72-73, 84 (1985) (O'Connor, J., concurring).

²¹⁰ See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 677-78 (1984) (equating "accommodation" and "acknowledgment" of religion in upholding public display).

however, is that the accommodation is actually available for all to use if desired. In *Kiryas Joel*, the Court struck down the accommodation because it found that the state legislature was highly unlikely to have made a similar accommodation for other religious communities that might find themselves similarly burdened.²¹¹

4. The Accommodation Must Not Impose Significant Burdens on Third Parties

In some respects, the basis for this criterion is the least obvious, although it dominated the Court's rulings in both *Estate of Thornton* and *Cutter*. In his scholarly work on accommodation, Judge (then-Professor) Michael McConnell suggested that the limit on third-party burdens relates primarily to concerns about religious favoritism.²¹² An accommodation that systematically alleviates burdens on the religious and imposes a disproportionate cost of that accommodation on third parties, McConnell argued, grants the protected religious exercise an improper privilege.²¹³ The Court's decision in *Estate of Thornton*, which McConnell describes as a situation in which "the burden on the nonbeneficiaries is disproportionate to the effect on the believer,"²¹⁴ provides a good example of this concern about favoring religion.²¹⁵

Moreover, in some contexts, the imposition of burdens on third parties may pressure such parties to participate in the accommodated religious activity. This concern animated Justice Frankfurter's dissent in *Zorach*, in which he argued that the captivity of non-participating children created public pressure on those children to engage in the religious instruction.²¹⁶

The strength of this criterion is uncertain because it has been applied in relatively few decisions. Nonetheless, it could have dramatic consequences for certain accommodations. For example, the State of Alabama exempts religious day care providers from state licensing requirements,²¹⁷ thus creating a significant competitive disadvantage for secular day care centers that must satisfy

²¹¹ 512 U.S. at 702-07.

²¹² Michael W. McConnell, *Accommodation of Religion: an Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 702-05 (1992) [hereinafter McConnell's *Response to the Critics*]; Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 37-39 (1985).

²¹³ McConnell's *Response to the Critics*, *supra* note 212, at 703.

²¹⁴ *Id.*

²¹⁵ *Id.*; *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985).

²¹⁶ *Zorach v. Clauson*, 343 U.S. 306, 320-21 (1952) (Frankfurter, J., dissenting). *See also id.* at 323-24 (Jackson, J., dissenting); McConnell's *Response to the Critics*, *supra* note 212, at 705 (if schools fail to provide secular options for students who do not want to use released time for religious instruction, the state may be creating an incentive for students to participate in religious instruction).

²¹⁷ *See* Diana B. Henriques, *Religion Trumps Regulation as Legal Exemptions Grow*, N.Y. TIMES, Oct. 8, 2006, at A1 (describing Alabama system of regulating day care centers).

these requirements. And the land use portions of RLUIPA, which accord significant protections to religious properties from zoning and other property regulations,²¹⁸ may, in some circumstances, result in the imposition of substantial burdens on the interests of neighboring owners and users of land.

Within the boundaries of these four criteria, the government has considerable discretion with respect to permissive accommodations of religion. In Part IV below, we analyze the military chaplaincy in light of this paradigm of religious accommodation.

IV. THE MILITARY CHAPLAINCY AS ACCOMMODATION

In this part, we begin by describing the legally salient features of the military chaplaincy. We then apply the Establishment Clause criteria for religious accommodations to the chaplaincy as a whole.

The “military chaplaincy” actually consists of three distinct institutions: the Chaplains Corps of the Army, the Chaplains Corps of the Navy, and the Air Force Chaplains Service.²¹⁹ (Navy chaplains also serve the Marine Corps, Coast Guard, and Merchant Marine.)²²⁰ The regulations and practices of the three institutions vary to some degree, owing at least in part to the differing missions of the services. But all three receive their basic legal and operational form through Department of Defense regulations, which implement the statutory authorization for the chaplaincies.²²¹

These regulations include two core requirements for the service chaplaincies, which are reflected in the general structure of the chaplaincies and also in the particular tasks assigned to individual chaplains. First, chaplains are commissioned to provide religious services in accordance with the tenets of the religious community that endorsed them for the chaplaincy.²²² Second, of equal significance, they also provide commanders with advice and assistance in meeting the religious needs of all those for whom the commander has responsibility, regardless of religious affiliations.²²³ These two requirements—the particular-

²¹⁸ 42 U.S.C. § 2000cc (2000). See *Elsinore Christian Ctr. v. City of Lake Elsinore*, 197 Fed.Appx. 718 (9th Cir. 2006) (unpublished opinion) (upholding constitutionality of Section II of RLUIPA).

²¹⁹ AF POLICY DIR. 52-1, *supra* note 10; AR 165-1, *supra* note 10, at para. 1-4.c; SEC’Y OF NAVY, U.S. DEP’T OF NAVY, INSTR. 1730.7B, RELIGIOUS MINISTRY SUPPORT WITHIN THE DEPARTMENT OF THE NAVY para. 4.b. (12 Oct. 2000) [hereinafter SECNAV INSTR. 1730.7B] (Navy Chief of Chaplains as head of Chaplains Corps of the Navy).

²²⁰ SECNAV INSTR. 1730.7B, *supra* note 219, para. 6.

²²¹ DOD DIR. 1304.19, *supra* note 8; DOD INSTR. 1304.28, *supra* note 9; U.S. DEP’T DEFENSE, DIR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (03 Feb. 1988) [hereinafter DOD DIR. 1300.17].

²²² AF POLICY DIR. 52-1, *supra* note 10, para. 3.4.2; AR 165-1, *supra* note 10, para. 4-4; SECNAV INSTR. 1730.7B, *supra* note 219; OPNAV INSTR. 1730.1D, *supra* note 10, para. 5.b.(2).

²²³ DOD DIR. 1304.19, *supra* note 8, para. 4; AF POLICY DIR. 52-1, *supra* note 10, para. 3.4.1; AR 165-1, *supra* note 10, para. 4.5; OPNAV INSTR. 1730.1D, *supra* note 10, para. 5.b.(1).

ism of a chaplain's ministry within a specific faith group, and the pluralism demanded by the obligation to assist all in need—are evident in the service of each chaplain and provide the basic framework for understanding the chaplaincy.

In order to be eligible for service as a chaplain, candidates must meet minimum educational qualifications (including a graduate degree), have experience in religious ministry and obtain an endorsement by a DOD-approved religious organization.²²⁴ The endorsement certifies that the candidate is recognized by that faith group as “fully qualified”—i.e., ordained, or its functional equivalent—for professional ministry within that faith group.²²⁵ Both the endorsing religious organization and the candidate must understand and accept the chaplain's role within the “pluralistic environment” of the military, which includes the obligation to facilitate the free exercise of all who are served by the chaplaincy.²²⁶ If a religious organization subsequently withdraws its endorsement for a chaplain, that chaplain ceases to be eligible for continued service and must seek another endorsing organization, transfer to another (non-chaplain) position within the military or leave the military altogether.²²⁷

Chaplains serve as commissioned officers.²²⁸ As noted earlier, their primary obligations are to provide religious support, including worship and pastoral care, to eligible personnel, and to provide advice and assistance to commanders on religious and related matters, including assistance in facilitating the religious exercise of all personnel. Chaplains may also be assigned a number of other tasks, including supervision of other chaplains and religious facilities, counseling of individuals and families, participation in official ceremonies, and instruction in “the moral and ethical quality of leadership.”²²⁹ Chaplains are specifically forbidden by the services to undertake responsibilities that would directly involve them as combatants or in the exercise of military command.²³⁰ The services provide significant and ongoing training for chaplains in a variety of areas, ranging from the basic expectations of military service to more ad-

²²⁴ DOD INSTR. 1304.28, *supra* note 9, para. 6.1-4. *See also* Bindon, *supra* note 4, at 250 to 51 (on chaplaincy selection process).

²²⁵ DOD INSTR. 1304.28, *supra* note 9, para. 6.1.1.

²²⁶ *Id.* at para. 6.1.3. *See also* DOD DIR. 1304.19, *supra* note 8, para. 4.2.

²²⁷ DOD INSTR. 1304.28, *supra* note 9, para. 6.5.

²²⁸ *Id.* at para. E2.1.2. (Defining “chaplain” as “[a] commissioned officer of the Chaplain Corps of the Army, a commissioned officer of the Chaplain Corps of the Navy, or a commissioned officer in the Air Force designated for duty as a chaplain.”).

²²⁹ *See* AR 165-1, *supra* note 10, para. 4-4 to 4-5; OPNAV INSTR. 1730.1D, *supra* note 10, para. 5.b.(2) to (5).

²³⁰ Prohibited activity includes service as a member of a court martial tribunal. *See* AR 165-1, *supra* note 10, para. 4-3; OPNAV Instr. 1730.1D, *supra* note 10, para. 5.e.(11). The Geneva Convention classifies chaplains as non-combatants, and chaplains enjoy the protections of that status as long as they are “exclusively engaged in the work of their ministry.” Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Part II: Wounded, Sick, and Shipwrecked, Section I – General Protection, art. 8, Terminology, para. (d), June 8, 1977, 6 U.S.T. 3114.

vanced study of clinical pastoral care, military ethics and comparative religions.²³¹

Chaplains are eligible for promotion. As they increase in rank, the balance of their duties tends to shift away from the direct provision of religious services and toward greater administrative responsibilities within the chaplaincy.²³² Upon reaching a specified age or time in grade without promotion, chaplains are required to resign or retire from the service, though such a requirement may be waived in special circumstances.²³³

As we noted earlier, the military has faced no direct and comprehensive Establishment Clause challenge to the chaplaincy since the *Katcoff* decision, and the result of any such lawsuit is highly unlikely to be any different now or in the foreseeable future. Nonetheless, the legal justification for the chaplaincy should be made clearer, not the least because the constitutionality of specific practices within the chaplaincy will depend in large measure on the underlying legal justification for the institution as a whole. Consideration of the four criteria for the constitutionality of religious accommodations, unpacked at the end of Part III,²³⁴ facilitates the effort to better understand and defend the institution of the chaplaincy.

A. *Does the Chaplaincy Relieve a Government-Imposed Burden on Religious Exercise?*

The court in *Katcoff* recognized that the legitimacy of the military chaplaincy rests on its response to the religious needs of service members.²³⁵ The court focused exclusively on one aspect of the religious burden on service members—isolation from their home religious communities when deployed overseas or to remote domestic postings.²³⁶ If such isolation is the sole burden to which the chaplaincy responds, then the appellate court in *Katcoff* was correct

²³¹ See, e.g., AR 165-1, *supra* note 10, paras. 8-6, 10-1 to 10-4 (chaplain training programs). See generally DEP'T OF THE ARMY, PAM. 165-3, RELIGIOUS ACTIVITIES: CHAPLAIN TRAINING STRATEGY (01 Sept. 1988) [hereinafter AR PAM 165-3]. See also DEP'T OF THE ARMY, PAM. 165-17, RELIGIOUS ACTIVITIES: CHAPLAIN PERSONNEL MANAGEMENT para. 4-1 to 4-13 (11 May 1998) [hereinafter AR PAM 165-17].

²³² JOINT CHIEFS OF STAFF, JOINT PUB. 1-05, RELIGIOUS SUPPORT IN JOINT OPERATIONS II-3 to 5 (09 June 2004) [hereinafter JP 1-05] (describing duties of chaplains with reference to rank). See also AR PAM 165-17, *supra* note 231, para. 7-1 to 7-7.

²³³ See AR PAM 165-17, *supra* note 231, paras. 6-2 to 6-13, 7-7. See also *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 293-94 (D.C. Cir. 2006) (describing Navy policy of promotion and retention of chaplains).

²³⁴ See *supra* notes 201-18 and accompanying text.

²³⁵ *Katcoff v. Marsh*, 755 F.2d 223, 234-35 (2d Cir. 1985).

²³⁶ *Id.* at 235-37. The isolation is caused both by remoteness and also by the requirements of military order and security, which prevents civilians from having ready access to soldiers in deployment. *Id.* at 236.

in remanding the case for review of the scope of the chaplaincy.²³⁷ Even allowing for an appropriate degree of deference to the military, the ministry of chaplains in many domestic settings would be rendered constitutionally vulnerable if isolation of service members were its sole justification.

A richer understanding of the religious burden on service members, however, would provide a firmer constitutional footing for the chaplaincy, as well as a more accurate picture of the chaplaincy's significance. This burden of military service has two related dimensions. First, the military—unlike virtually all other professions—constitutes a distinct community, providing even in domestic bases virtually all facets of ordinary life: from housing, schools, and healthcare to shopping, recreation, and entertainment.²³⁸ The exclusion of organized religion from that community would deprive service members and their families of the ordinary opportunity enjoyed by civilians to have a religious experience that is integrated into their normal lives. The military chaplaincy responds to that burden by offering service members and their families the opportunity to participate in religious experience that is integrated with their broader military communal life. In this sense, the chaplaincy is an equalizer, giving religious experience the same presence in a military community as other, secular aspects of life.

Second, the military presents service members with a range of stresses and other experiences that are unique, especially those related to participation in combat, which has become an ever-present reality for service members on active duty and in the reserves. These stresses may have significant effects on service members' religious beliefs, as well as their understandings of self and relationships with others.²³⁹ Such stresses and the predictable moral, spiritual and emotional reactions that follow constitute a real burden on service members, and the government is constitutionally permitted to design a chaplaincy that responds to such a burden.²⁴⁰ An adequate response to that burden includes chaplains who understand and share the military experience of those to whom they minister.²⁴¹

Taken together, these two dimensions of the religious burden of military service suggest a broader latitude for accommodation than found in the *Katcoff*

²³⁷ *Id.* at 238.

²³⁸ HUTCHESON, *supra* note 238. See generally, U.S. Army, *Welcome to the Army Family: A First Guide for Army Spouses and Family Members*, <http://www.per.hqusaureur.army.mil/FRSA/docs/welcometothearmyfamily1.pdf>.

²³⁹ Robert J. Phillips, *The Military Chaplaincy of the 21st Century: Cui Bono?* (unpublished paper, originally presented at 2007 International Society for Military Ethics (copy on file with authors and WEST VIRGINIA LAW REVIEW)).

²⁴⁰ *Larsen v. U.S. Navy*, 486 F. Supp. 2d 11, 31-33 (D.D.C. 2007).

²⁴¹ The closest analogy on this point would be the chaplains of police and fire departments who fill a similar role in those trauma-filled professions. See, e.g., *Malyon v. Pierce County*, 935 P.2d 1272 (Wash. 1997) (chaplaincy program in sheriff's department did not violate Establishment Clause). But see *Voswinkel v. City of Charlotte*, 495 F. Supp. 588 (W.D.N.C. 1980) (police department chaplaincy violated Establishment Clause).

analysis. The latitude remains bounded because not every facet of the chaplaincy is likely to be reasonably characterized as a response to these burdens. But the *Katcoff* challenge questioned the validity of the institution as a whole, and questioned whether the existence of a professional military chaplaincy, fully integrated into the life of units and the broader military community, represented a reasonable response to burdens imposed on service members' free exercise. The richer account of such burdens suggests that the institution may fairly be described as responsive.

B. Does the Accommodation Facilitate Private and Voluntary Religious Practice?

This criterion highlights an important difference between the military chaplaincy and most other accommodations of religion. Other accommodations create opportunities for private religious experience by relieving beneficiaries of specific burdens, such as a work schedule that interferes with Sabbath observance, or a ban on wearing certain apparel that might be religiously mandated for some people.²⁴² As such, the accommodations typically work in the negative by removing obstacles. In stark contrast, the military chaplaincy is a thoroughly positive accommodation. The military may permit service members free time for religious experience, but the chaplaincy also creates the content of such experiences through preaching, worship, religious instruction and pastoral care.²⁴³ Accommodations that serve only to create time or physical space for religious observance readily meet the requirement that such exercises must be private and voluntary because the entity making the accommodation is detached from the religious experience itself.

To meet its obligations under this second criterion, the military must show that the religious experiences provided by chaplains are responsive to the expressed religious preferences of service members. Such a showing may be more difficult, or at least more complicated, than it appears because the chaplaincy—like any institution—operates from its own inertia and the inclinations and competences of its service providers, and not entirely from the articulated desires of its “customers.” Moreover, the chaplaincy certainly plays a role in creating a demand for its services, and also in shaping which services are demanded. For example, a chaplain who socializes with troops may invite service members to religious activities led by that chaplain.²⁴⁴ The military responds to

²⁴² Indeed, the military provides more traditional religious accommodations in the form of exemptions from general regulations. See DOD DIR. 1300.17, *supra* note 221, para. 3.2.1, 3.2.6 to 3.2.7 (1988) (establishing policy on religious exemptions from work schedules and uniform requirements). See also U.S. DEP'T OF NAVY, NAVAL MILITARY PERSONNEL MANUAL 1731-010, 2(a) (01 Aug. 2006) [hereinafter OPNAV MANUAL 1731-010] (providing accommodation for day of religious observance).

²⁴³ See, e.g., AR 165-1, *supra* note 10, para. 4-4.a. & k. (describing duties of chaplains).

²⁴⁴ HUTCHESON, *supra* note 238, at 71-74. See also Fitzkee & Letendre, *supra* note 4, at 38-43 (discussing limits on religious speech by chaplains).

this issue by providing that participation in all religious activities must be voluntary.²⁴⁵ Commanders at all levels are required to ensure that service members are not subjected to official pressure to attend religious services or otherwise engage in religious activity.²⁴⁶ Chaplains that provide non-religious services, such as training in leadership and ethics, are prohibited from using such opportunities to engage in religious instruction, or even to urge service members to participate in religious activities.²⁴⁷

The military's emphasis on voluntary participation by service members in religious activities conforms to the requirement that accommodations must respond to private religious needs. This conformity is even more evident in the military's consistent message that the first duty of a chaplain is to facilitate the free religious exercise of those who come within the chaplain's sphere of responsibility.²⁴⁸ The actual performance of religious services is a subordinated obligation for the chaplain, one that arises in response to particular needs.²⁴⁹

However, the military chaplaincy is not uniformly responsive. It retains elements that seem more to reflect government promotion, rather than accommodation, of religion. In part, this lack of uniformity may simply reflect an incomplete transformation of a culture within the chaplaincy toward one that is consistently focused on accommodation.²⁵⁰ For example, a document from the Army's Training and Doctrine Command (TRADOC), which describes the Army's vision for chaplaincy within "Force XXI"—the 21st century Army—offers the following account of the chaplain's role:

The Chaplaincy provides for the free exercise of religion for soldiers, their family members, and authorized civilians in a single seamless system. The UMT [unit ministry team] provides comprehensive RS [religious support] and presents the

²⁴⁵ See, e.g., AR 165-1, *supra* note 10, para. 3-2.a. ("Participation of Army personnel in religious services is strictly voluntary.").

²⁴⁶ *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972) (holding unconstitutional mandatory chapel attendance policy at military academies). See also *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003) (holding unconstitutional practice of mandatory "supper prayer" at Virginia Military Institute).

²⁴⁷ See U.S. DEP'T OF ARMY, PAM. 165-16, MORAL LEADERSHIP/VALUES STAGES OF THE FAMILY LIFE CYCLE, para. 1-2 (30 Oct. 1987) [hereinafter AR PAM 165-16] ("Chaplain instructors have a responsibility to avoid any action, which would tend to confuse this training with religious instruction.").

²⁴⁸ DOD DIR. 1304.19, *supra* note 8, para. 4.1. See Wildhack, *supra* note 4, at 229-32.

²⁴⁹ DOD DIR. 1304.19, *supra* note 8, para. 4.2.

²⁵⁰ HUTCHESON, *supra* note 238, at 82-83. See also ANNE C. LOVELAND, AMERICAN EVANGELICALS AND THE U.S. MILITARY 1942-1993, 296-322 (1996).

power of God in the lives of soldiers, families, and authorized civilians.²⁵¹

The document continues with similar substantive theological claims about the role of the chaplain.

The UMT represents the comfort and hope of religion and truth in the high stress environment of military operations and frequent deployments Our strength as an Army mirrors the very soul of the nation. The Chaplaincy adds the dimension of a loving and caring God to the environment in which soldiers and Army families live and serve.²⁵²

It is easy, of course, to exaggerate the significance of such statements, especially in a document that is now a decade old. Nonetheless, the sentiments conveyed in the TRADOC paper reflect an important, if subtle, tension with the vision of the military chaplaincy as an instrument of religious accommodation. Those sentiments profess, in the official words of the Army, specific theological commitments—that God exists, is powerful, has a connection to the soul of America and cares for and loves people. Such official religious professions cannot be justified through the model of religious accommodations outlined above.

The Air Force makes a similar claim in a document that is more recent and more authoritative than the TRADOC paper. Air Force Instruction 52-1 describes chaplains as “visible reminders of the Holy,”²⁵³ although it immediately links that description with chaplains’ duty to facilitate the free exercise of religion by servicemembers. Compared to substantive religious claims found in the TRADOC paper, in which God is asserted to be powerful and loving, the Air Force Instruction suggests only a link between chaplains and “the Holy.” Nonetheless, the link represents a departure – if only the most innocuous – from the military’s responsive role, in which the military provides chaplains who receive their religious endorsements from specific religious communities. Instead, the Air Force assertion appears to warrant the religious authority of chaplains, and indeed to warrant the reality of divine presence. Neither warrant is consistent with the Establishment Clause limits on the practice of accommodation.²⁵⁴

²⁵¹ U.S. DEP’T OF ARMY, TRAINING AND DOCTRINE PAM. 525-78, RELIGIOUS SUPPORT TO FORCE XXI: U.S. ARMY CHAPLAIN UNIT MINISTRY TEAMS para. 3-1a(1) (Sept. 1997).

²⁵² *Id.* at para. 3-1b, 3-2a.

²⁵³ U.S. DEP’T OF AIR FORCE, INSTR. 52-101, CHAPLAIN PLANNING AND ORGANIZATION para. 2.1 (21 June 2002) [hereinafter AF INSTR. 52-101].

²⁵⁴ Such an attitude seems to have been much more common prior to the *Katcoff* litigation. See HUTCHESON, *supra* note 238, at 52 (service of religion to mission of military); Paul J. Weber, *The First Amendment and the Military Chaplaincy: The Process of Reform*, 22 J. CHURCH & ST. 459, 464-66 (1980) (religious mission of the military accomplished through chaplaincy).

A different challenge to the chaplaincy's responsive role arises from the question of proselytizing by chaplains, a question left implicit in our earlier example of the chaplain who invites service members to participate in religious activities.²⁵⁵ The issue arises within a vacuum of regulation, and even of official guidance, covering the chaplain's engagement with service members.²⁵⁶ Some types and situations of proselytizing are clearly prohibited, such as those that involve harassment or assertions of official authority (although chaplains do not exert command authority, they are commissioned officers and are as such entitled to official respect).²⁵⁷ Chaplains are also forbidden to use their conduct of official non-religious services, such as morale support or leadership education, as an opportunity for proselytizing.²⁵⁸ Apart from such restrictions, chaplains may argue that proselytizing is an essential part of their ministry, and—as long as performed in a non-coercive manner—is fully consistent with service members' rights of free exercise.

Because existing regulations neither prohibit nor expressly permit such proselytizing by chaplains, two essential questions about the constitutionality of the practice need to be answered. First, does the Establishment Clause require the government to prohibit non-coercive proselytizing by chaplains? Second, does the Free Exercise Clause (or perhaps RFRA) grant to chaplains the right to engage in proselytizing? The two questions are interdependent because an affirmative answer to either one would likely require a negative answer to the other.

²⁵⁵ This question was raised most recently, and most publicly, in the controversy surrounding religious conduct at the Air Force Academy. See generally Cook, *supra* note 4; *Report of Americans United for Separation of Church and State on Religious Coercion and Endorsement of Religion at the United States Air Force Academy*, <http://www.au.org/pdf/050428AirForceReport.pdf>; Laurie Goodstein, *Religious-Bias Inquiry is Set at Air Force Academy*, N.Y. TIMES, May 5, 2005, at A29; Laurie Goodstein, *Air Force Chaplain Tells of Academy Proselytizing*, N.Y. TIMES, May 12, 2005, at A16. We do not address the equally—although differently—complicated question of proselytizing by service members, but focus here exclusively on such conduct by chaplains. We also defer for now the narrower question of a chaplain's conduct of pastoral care, which we take up later as a distinct practice of the chaplaincy. See *infra* Part V.B.3.

²⁵⁶ The Air Force Chaplain School briefly distributed to its students a code of ethics for chaplains that was produced by the National Conference on Ministry to the Armed Forces (NCMAF), an interfaith association that includes most of the religious bodies that endorse chaplains for the armed services. The NCMAF ethics code states: "I will not proselytize from other religious bodies, but I retain the right to evangelize those who are not affiliated." NCMAF, *Covenant and Code of Ethics for Chaplains of the Armed Forces*, <http://www.ncmaf.org/policies/codeofethics.htm>. The Air Force stopped distributing the code, and said that the code was not an official statement of Air Force policy. Alan Cooperman, *Air Force Withdraws Paper for Chaplains: Document Permitted Proselytizing*, WASH. POST, Oct. 11, 2005, at A3. Chaplain Cecil Richardson—now the Air Force's deputy chief of chaplains—endorsed the statement from the NCMAF ethics code in an interview with the *New York Times*. Laurie Goodstein, *Evangelicals are a Growing Force in the Military Chaplain Corps*, N.Y. TIMES, July 12, 2005, at A1.

²⁵⁷ 10 U.S.C. § 3581 (1956) ("A chaplain has rank without command."). See, e.g., AR 165-1, *supra* note 10, para. 4-3.a.

²⁵⁸ See, e.g., AR PAM 165-16, *supra* note 247, para. 1-2.

With respect to the Establishment Clause, the answer would turn on the extent to which such proselytizing might reasonably be attributed to the government, acting through its agent the chaplain. Chaplains are entitled, and are indeed required, to conduct worship services in accordance with the dictates of their faith.²⁵⁹ The religious content of the worship services fits within the justification provided for a religious accommodation because service members choose to participate. But where such choice is not present—or, as the chaplain might say, not *yet* present—that justification is far less compelling. At best, the government could argue that proselytizing represents nothing more than a chaplain informing service members of religious opportunities available to them. This description is, of course, greatly weakened to the extent that the chaplain suggests only one such opportunity, or at least the theological efficacy of only one such opportunity.

What, then, of the chaplain's free exercise claim to engage in proselytizing?²⁶⁰ This interest is significantly weaker than the government's potential Establishment Clause liability for proselytizing by chaplains. To begin with, the chaplain's asserted right would be judged under the standard reflected in *Goldman v. Weinberger*,²⁶¹ which suggested extraordinary deference to military authority when service members assert free exercise claims.²⁶² There is simply no reason to treat chaplains differently from other service members for purposes of applying the teachings of *Goldman*. Indeed, the chaplain entered the military subject to an explicit understanding that the chaplaincy "function[s] in a pluralistic environment," and is committed "to support directly and indirectly the free exercise of religion by all" who are authorized to receive services.²⁶³ A court would accord quite significant deference to a judgment by the military that proselytizing may cause tension and divisiveness within the ranks, and may interfere with the chaplain's primary obligation to facilitate the free religious exercise of service members.

C. *Is the Accommodation Available on a Denomination-Neutral Basis?*

Compared to the second criterion, analysis of the third is relatively straightforward. The chaplaincy is formally open to authorized clergy of all faiths, subject to the requirement of having a DOD-recognized endorsing organization.²⁶⁴ Chaplains are required to facilitate all service members' free ex-

²⁵⁹ AR 165-1, *supra* note 10, para. 4-4.a. & e.; AF POLICY DIR. 52-1, *supra* note 10, para. 3.4.2; OPNAV INSTR. 1730.1D, *supra* note 10, para. 5.e.(1).

²⁶⁰ See Rosen, *supra* note 4, at 1152-58.

²⁶¹ 475 U.S. 503 (1986).

²⁶² *Id.* at 508; see also *Larsen v. U.S. Navy*, 486 F. Supp. 2d 11, 26-28 (D.D.C. 2007) (discussing deferential standard drawn from *Goldman*).

²⁶³ DOD INSTR. 1304.28, *supra* note 9, para. 6.1.3.

²⁶⁴ The question of unlawful discrimination in DOD approval of endorsing organizations is suggested by a recent dispute over a Wiccan chaplain. See Alan Cooperman, *For Gods and Coun-*

ercise of religion.²⁶⁵ This includes direct services by military chaplains; arrangements with civilian religious leaders or lay leaders if military chaplains are not able to meet the needs of particular faith groups; and supportive services coordinated by chaplains, including provision of space or materials needed for religious activities.²⁶⁶ Although it is certainly possible, and perhaps likely, that challenges will be brought because of the military's failure to make adequate accommodations for a particular faith group, nothing in the overall structure of the chaplaincy suggests that the institution is designed to promote certain faiths.²⁶⁷

D. Does the Accommodation Impose Significant Burdens on Third Parties?

At first glance, assessment of this criterion would appear to proceed along the same lines taken by the Supreme Court in *Cutter*, in its scrutiny of the RLUIPA accommodation.²⁶⁸ Just as the Court in *Cutter* suggested deference to prison authorities with respect to the costs of prison accommodation, courts are likely to trust the military to protect the welfare of service members from exposure to serious burdens that might result from the accommodation. But the analogy to prison accommodations quickly breaks down because the chaplaincy and RLUIPA's protections for "institutionalized persons" represent different forms of accommodation. The harms resulting from the chaplaincy might not be the same ones attaching to RLUIPA accommodations, which find their direct parallel in the military's standard rules on accommodation of individual religious practices.²⁶⁹

The burdens of conventional accommodation of religious practice by service members might include, for example, increased obligations to perform certain kinds of tasks because a fellow unit member has a religious reason for not performing them. There is no reason to believe that the military has categorically preferred the accommodation of religious beliefs to other relevant considerations, such as familial needs, nor is there any reason to believe that a mission-oriented military would permit accommodations that generated third-party burdens greatly disproportionate to benefits bestowed on the beneficiaries of

try: *The Army Chaplain Who Wanted to Switch to Wicca? Transfer Denied*, WASH. POST, Feb. 19, 2007, at C1.

²⁶⁵ DOD INSTR. 1304.28, *supra* note 9, para. 6.1.3.

²⁶⁶ AF INSTR. 52-101, *supra* note 253, para. 3.2; AR 165-1, *supra* note 10, paras. 4-5, 5-5; OPNAV INSTR. 1730.1D, *supra* note 10, para. 5.b.(2).

²⁶⁷ In Part V.A. *infra*, we discuss the related and heavily litigated question of religious preferences in the selection, promotion, and retention of chaplains.

²⁶⁸ *Cutter v. Wilkinson*, 544 U.S. 709, 722-25 (2005).

²⁶⁹ See generally DOD DIR. 1300.17, *supra* note 221 (implementing the statutory reaction to *Goldman v. Weinberger*, 475 U.S. 503 (1986)).

those accommodations. Accordingly, concerns present in *Estate of Thornton*²⁷⁰ are not likely to arise in the military context.

Instead, the burdens at issue in evaluating the chaplaincy would be those that result from the affirmative operation of the chaplaincy itself. To the extent that the chaplaincy functions as an optional feature of military life, the burdens on third parties—non-participants—are likely to be no more than minor.²⁷¹ If, however, the military tolerates or approves of more assertive interactions between chaplains and service members, especially in contexts of particular vulnerability for the service members, then the harms might be seen as more substantial. As in the case of RLUIPA's required accommodations of religious practices in prison, the structure of the military chaplaincy does not suggest any systematic burdens on third parties. Assertions of unconstitutional burdens on third parties must be evaluated on a case-by-case basis, rather than with respect to the institution as a whole. Analyzed in light of its overall structure, the institution of the military chaplaincy is readily defensible as an accommodation of religion. The military chaplaincy is capable of being conducted in a constitutional manner, even if particular practices might be vulnerable to challenge. In what follows, we explore several such practices and analyze the circumstances in which the organization and operation of the chaplaincy might transgress constitutional limits.

V. ACCOMMODATION NORMS AS APPLIED TO PARTICULAR PRACTICES WITHIN THE CHAPLAINCY

In Part V, we address two contexts within the military chaplaincy in which significant constitutional issues have been raised. We first consider the services' policies for accession, promotion, and retention of chaplains. We then examine the services' regulation of particular aspects of chaplains' ministry, including the conduct of worship, prayer at official functions, and the exercise of pastoral care.

A. *Employment of Chaplains*

For more than a decade, a series of lawsuits in the federal courts of the District of Columbia has addressed allegations of religious preferences in the employment of Navy chaplains.²⁷² Although the lawsuits involve a variety of

²⁷⁰ *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985). See *supra* Part III.B.4.

²⁷¹ See, e.g., AR 165-1, *supra* note 10, para. 3-2a ("Participation of Army personnel in religious services is strictly voluntary. However, Army personnel may be required to provide logistic support before, during, or after worship services or religious programs.").

²⁷² *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290 (D.C. Cir. 2006); *In re. England*, 375 F.3d 1169 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1152 (2005); *Larsen v. U.S. Navy*, 486 F. Supp. 2d 11 (D.D.C. 2007); *Adair v. England*, 417 F. Supp. 2d 1 (D.D.C. 2006); see also *Wilkins v. U.S.*, 2005 U.S. Dist. LEXIS 41268 (S.D. Cal. 2003). See generally, Ducoat, *supra* note 4; Aden, *supra* note 4, Wildhack, *supra* note 4.

claims, most focus on an alleged “Thirds” policy of the Navy to apportion slots within the Chaplains Corps based on religious affiliation, with one-third each going to Roman Catholics, “liturgical Protestants,” and “non-liturgical Christians,” with a small portion left for “Special Worship” (i.e., all other faith groups).²⁷³ Such an apportionment, the lawsuits allege, is impermissible because it results in the significant over-representation of Roman Catholics and “liturgical Protestants,” and under-representation of those classified as “non-liturgical Christians,”²⁷⁴ a group that includes most evangelical Christians. This discrimination, the lawsuits allege, pervades the personnel policies of the Navy Chaplains Corps, from accession and promotion through retention.²⁷⁵

Chaplaincy personnel policies must function within a complex constitutional, statutory, and regulatory matrix. On the one hand, explicitly religion-based employment policies of the government are ordinarily treated as constitutionally suspect, typically requiring strict scrutiny when a matter of official policy.²⁷⁶ On the other hand, the justification for a military chaplaincy rests on the ability of chaplains to provide specific religious services to the military, so the military has good reason to focus on the religious identity of chaplains. Reconciling these two considerations—the default prohibition on religion-based employment discrimination, and the religion-conscious needs of the military chaplaincy—represents a constitutional challenge.

One key to reconciliation appears in the standard trajectory of a military chaplain’s career. In the lower ranks, chaplains are more involved in the direct provision of religious services, and proportionately less involved in administrative or other duties.²⁷⁷ As they progress up through the ranks, the proportions shift, and more senior chaplains tend to lack direct responsibility for provision of religious services.²⁷⁸ Promotions, thus, should arguably be religion-neutral because they should be used to evaluate and reward the chaplain’s performance of the broader, essentially secular role of facilitating the free exercise of those within the chaplain’s responsibility.

At the time of accession, the religious identity of a chaplain is most likely to be relevant to the military’s needs. Nevertheless, as revealed by recent

²⁷³ *Chaplaincy of Full Gospel Churches*, 454 F.3d at 294-95; *Larsen*, 486 F. Supp. 2d at 15-17.

²⁷⁴ A court described “non-liturgical Protestants” as follows: “‘non-liturgical’ denotes Christian denominations or faith groups that do not have a formal liturgy or order in their worship service. According to the plaintiffs, these groups baptize only adults or children who have reached ‘the age of reason’ and their clergy do not usually wear vestments or special religious dress during services. Referred to by some Navy chaplains as ‘low church,’ the non-liturgical Christian categories include Baptist, Evangelical, Pentecostal, and Charismatic faith groups.” *Adair*, 183 F. Supp. 2d at 36 (citations omitted). See also *Aden*, *supra* note 4, at 221-16.

²⁷⁵ *Chaplaincy of Full Gospel Churches*, 454 F.3d at 295-96.

²⁷⁶ *Adair*, 183 F. Supp. 2d at 46-50 (discussing *Larson v. Valente*, 456 U.S. 228 (1982)).

²⁷⁷ JP 1-05, *supra* note 232, paras. II-3 to II-5.

²⁷⁸ *Id.*

litigation over accession to the chaplaincy,²⁷⁹ recruitment of new chaplains is likely to be guided by a complex, service-specific calculus regarding the need to accommodate the religious exercise of service members.

In *Larsen v. U.S. Navy*,²⁸⁰ the U.S. District Court for the District of Columbia recently ruled in favor of the Navy in a case involving claims of religious discrimination in accession to a position as Navy chaplain. The plaintiffs included three Protestant ministers who had complained that the Navy unlawfully favored “liturgical” Protestant ministers over “non-liturgical” Protestant ministers like themselves.²⁸¹ “Non-liturgical” Protestant ministers are from denominations that do not use a formal liturgy or order of worship, and generally perform adult baptism rather than infant baptism.²⁸²

When the case began several years ago, the plaintiffs alleged that the Navy followed the “Thirds” policy described above.²⁸³ This division into thirds may (or may not) have once matched the demography of the U.S., but the complaint alleged that the distribution did not come close to reflecting the religious composition of the Navy by the 1990s.²⁸⁴ Thus, the “Thirds” policy resulted in substantial over-representation of liturgical Protestants and substantial under-representation of non-liturgical Protestants.²⁸⁵

The Navy did not admit that it had ever utilized the “Thirds” policy. Even if it had once utilized that policy, however, the district court found that it had abandoned the policy, and any challenge to it was now moot.²⁸⁶ Instead, by the time the case came to be heard on cross-motions for summary judgment, the Navy had switched to a denomination-neutral system for accession of chaplains.²⁸⁷ As the district court described the current policy, the Navy no longer tries “to link the composition of the Navy Chaplaincy to the religious denominational demographics of the community generally.”²⁸⁸ Instead, the Navy now

²⁷⁹ *Larsen v. U.S. Navy*, 486 F. Supp. 2d 11 (D.D.C. 2007).

²⁸⁰ *Id.*

²⁸¹ *Id.* at 15.

²⁸² *Adair*, 183 F. Supp. 2d at 36. *See also* Aden, *supra* note 4, at 213.

²⁸³ *See supra* notes 272-75 and accompanying text. *See also Larsen*, 486 F. Supp. 2d at 15-16.

²⁸⁴ *Adair*, 183 F. Supp. 2d at 40-41 (describing religious demography of the Navy); *Larsen*, 486 F. Supp. 2d at 15-16 (alleging under-representation of non-liturgical Protestants).

²⁸⁵ *Larsen*, 486 F. Supp. 2d at 16.

²⁸⁶ *Id.* at 24-25. Had the Navy openly maintained the sort of denominational preference reflected in the “Thirds” policy, the question of the legitimacy of such a preference would have been squarely presented. The plaintiffs had argued, citing *Larson v. Valente*, 456 U.S. 228 (1982), that courts must strictly scrutinize any such explicit denominational preference. *Id.* at 28. Whether the desire to match the religious demography of the chaplaincy with the religious demography of the Navy itself would have satisfied such a strict standard of review is difficult to say. Once the demography of the Navy changed in the direction of non-liturgical Protestants, however, there was no remaining justification for the “Thirds” beyond an illicit effort to maintain the existing distribution of power and authority in the Navy chaplaincy core.

²⁸⁷ *Larsen*, 486 F. Supp. 2d at 24-25.

²⁸⁸ *Id.* at 25.

considers a variety of factors in determining its chaplaincy accession needs, including:

“the breadth of locations where Navy personnel serve,” “the unique circumstances of Naval service, which involves personnel isolated on ships sailing all over the world,” “the various functions and tasks of chaplain officers outside of religious services including assistance to those of other faith groups and even no faith groups,” “the need to keep accession, promotion, and retention in line with other naval communities,” “the need to prevent shortages of qualified clergy,” “the need to maintain capacity to respond to events requiring quick access to chaplains from different faith groups not stationed on site, such as terror attacks,” and “the need to consider administrative necessities in managing an all-volunteer corps.”²⁸⁹

In light of the Navy’s explicit move away from denominational consciousness in selecting chaplains, the plaintiffs in *Larsen* shifted their theory of the case.²⁹⁰ Instead of arguing that the Navy was engaging in unconstitutional sectarian discrimination against non-liturgical Protestants, they argued that the Navy was constitutionally obligated to take religious denomination of applicants into account because that was the only way that the chaplaincy could be appropriately tailored to the free exercise needs of Navy personnel.²⁹¹ To put the point slightly differently, the plaintiffs argued that the chaplaincy should be denominationally proportionate to the religious demography of the Navy—if the Navy as a whole was, for example, composed of one-half non-liturgical Protestants, the Navy chaplaincy should be similarly constituted.

The district court rejected this claim. First, Judge Urbina concluded that strict scrutiny was not the appropriate standard of review for the plaintiffs’ claim of religious discrimination against non-liturgical Protestant ministers.²⁹² Instead, the court ruled that the plaintiffs had not demonstrated such discrimination under the Navy’s current system for accession to the chaplaincy.²⁹³ The court further rejected the plaintiffs’ argument that the only justification for the chaplaincy was the satisfaction of Navy personnel’s constitutional rights of free exercise, and that satisfaction of those rights required the Navy to tailor the population of the chaplaincy to the religious demography of the Navy. Relying

²⁸⁹ *Id.* at 25-26 (quoting exhibits)

²⁹⁰ *Id.* at 30-33.

²⁹¹ *Id.* at 30-31.

²⁹² *Id.* at 26-27.

²⁹³ *Id.* at 28 (“[T]he plaintiffs own data shows that under the Navy’s current accession policy, accession rates among applicants of different faith groups have ‘converged,’ and any previously existing statistical differences ‘have dissipated.’”) (citations omitted).

heavily on *Goldman v. Weinberger*,²⁹⁴ Judge Urbina explicitly adopted the model of permissive accommodation:

If, as is the case here, the Navy is permitted, but not constitutionally required, to accommodate religious needs of its members via a chaplaincy program, the Navy's program need not satisfy every single service members' free exercise need, but need only promote free exercise through its chaplaincy program. The program is constitutionally sound if it simply works toward accommodating those religious needs.²⁹⁵

Applying this concept of accommodation, coupled with *Goldman*-type deference to military judgment, the district court ruled that the current structure of accession to the Navy chaplaincy is consistent with the Constitution.²⁹⁶ The concept of permissive accommodation includes a zone of discretion, within which the government may decide how best to reconcile potentially conflicting objectives.²⁹⁷ The Navy's current approach was both acceptable and preferable to the plaintiffs' suggestion of demographic proportionality for several reasons. First, a policy of strict proportionality would inevitably mean that small religious minorities would have "no access to clergy of their faith."²⁹⁸ Second, a policy of strict proportionality does not adequately respond to worship variations among faiths and individuals; some groups and individuals require intense and frequent interaction with worship experience, while others typically make do with much less engagement with religion and its representatives.²⁹⁹ Third, in some instances, "clergy from one religious denomination are unable to cater to the religious needs of a service member from a different religious denomination."³⁰⁰ In contrast, other clergy are able to cross denominational lines more easily.³⁰¹

The Navy's accession policy, the court found, permits the flexibility to cope with these exigencies.³⁰² The Navy must "consider units or installations, rather than individuals or broad statistical representation, as the primary crite-

²⁹⁴ 475 U.S. 503 (1986).

²⁹⁵ *Larsen*, 486 F. Supp. 2d at 31 (citing Arlin Adams, *The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses*, 37 DEPAUL L. REV. 317 (1988)).

²⁹⁶ *Larsen*, 486 F. Supp. 2d at 33-34.

²⁹⁷ *Id.* at 31-32.

²⁹⁸ *Id.* at 35. The court offered the example of Muslims who represent less than .0027 of Navy personnel. Proportional representation would lead to only 2 Muslim chaplains in the entire Navy; instead, the Navy seeks to have at least 10 Muslim chaplains, "to ensure access to a chaplain of this tradition in every major geographical area." *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.* at 35-36.

tion in being able to serve the cumulative total of individual requirements most effectively.”³⁰³ Once more invoking deference under *Goldman*, the court concluded that perfect tailoring of the chaplaincy to the free exercise needs of individual Navy personnel is probably impossible to achieve, and is not constitutionally required.³⁰⁴

The *Larsen* opinion is a bit of a funhouse mirror. The case did not involve a conventional Establishment Clause challenge to the chaplaincy of the sort litigated in *Katcoff*. Instead, the *Larsen* plaintiffs wanted to participate in a chaplaincy, but they wanted it shaped in a way that would make it easier for non-liturgical Protestant ministers to gain accession. Judge Urbina quite correctly perceived the problem; the plaintiffs wanted him to order the Navy to remake its accession policy in the image they preferred.³⁰⁵ To do so would be to hold that there was only one constitutionally correct way to structure accession—that is, in line with the religious demography of the Navy. As Judge Urbina noted, if he were to order such a restructuring, the Navy would inevitably become deeply, and perhaps unconstitutionally, involved in studying “the religious habits and interests of its service members.”³⁰⁶

At the most basic level, Judge Urbina’s opinion proceeds from the sound insight that the military chaplaincy is a matter of permissive, not mandatory, accommodation of religious need. No free exercise rights, of either chaplains or other service members, are at stake in its structure. Instead, the constitution gives bounded discretion to all branches of the armed forces to fill the personnel needs of the chaplaincy in ways that optimize the match between considerations of religious experience and other considerations of military efficiency. Whether or not the alleged “Thirds” policy fell within those boundaries, Judge Urbina’s decision to uphold the Navy’s current policy against denominational preference, and against a concept of religious proportionality in accession, seems constitutionally appropriate.³⁰⁷

B. Conduct of Ministry

Several aspects of chaplains’ ministry have also come under constitutional—and, in one case, quite political—scrutiny in recent years. We discuss three in this section: the conduct of faith group worship, prayer at official ceremonies, and the exercise of pastoral care.

³⁰³ *Id.* at 36 (citation omitted).

³⁰⁴ *Id.* See also *id.* at 32 (“[T]he Navy’s arguments convince the Court in their own right that stationing a chaplain wherever a service member needs one would be a logistical nightmare the execution of which would significantly and perpetually strain military resources.”).

³⁰⁵ *Id.* at 32-33, 35-36.

³⁰⁶ *Id.* at 35-36 (noting the potential entanglement problems associated with the plaintiffs’ preferred method of accession).

³⁰⁷ An appeal in *Larsen* is no doubt forthcoming.

1. Faith Group Worship

Worship, for most faiths, is the heart of religious experience; it is the center and source from which other obligations and practices radiate.³⁰⁸ The United States Code appropriately gives the same shape to the military chaplaincy. Regulations of the Department of Defense and the individual services specify a wide range of duties for chaplains, but the statutes command only two acts.³⁰⁹ Chaplains must hold worship services and must conduct burial services.³¹⁰

The obligation to hold worship, however, concerns the type of activity required rather than the content of that activity. The military allows chaplains to determine the substance of worship services, including liturgy, hymns and sermons.³¹¹ In delegating this responsibility to chaplains, the military responds to two potential concerns. First, the military assures chaplains and their endorsing bodies that chaplains will be free to lead worship “according to the manner and forms of the church of which [the chaplain] is a member.”³¹² If chaplains control the content of worship services that they lead they will be able to avoid participation in worship practices that are inconsistent with the demands of their particular religious traditions. Second, the delegation reflects the dual “commission” of chaplains. Although the military commissions chaplains to serve as staff officers who are responsible for facilitating service members’ free exercise, the military does not give chaplains the authority to perform religious rites such as administration of sacraments or conferral of blessings.³¹³ That authority

³⁰⁸ See generally MIRCEA ELIADE, *THE SACRED AND THE PROFANE: THE NATURE OF RELIGION* 20-65 (Willard R. Trask trans, Harper & Row Publishing 1961) (1957) (religious life founded on recognition of and entry into sacred space, as enacted in ritual).

³⁰⁹ AF INSTR. 52-101, *supra* note 253, paras. 3 to 5 (Air Force chaplain duties); AR 165-1, *supra* note 10, para 4.4 (Army chaplain duties); OPNAV INSTR. 1730.1D, *supra* note 10, para. 5.b. (Navy chaplain duties).

³¹⁰ 10 U.S.C. § 8547(a) (2000) (Air Force); 10 U.S.C. § 3547(a) (2000) (Army); 10 U.S.C § 6031(a) (2000) (Navy).

³¹¹ See, e.g., AF INSTR. 52-101, *supra* note 253, para. 3.2.2.2.:

Worship services may be designed by chaplains in response to a broad population possessing common beliefs and desiring a specific style of worship. The terms “liturgical,” “traditional,” “contemporary,” “gospel” and “praise” are exclusively used to identify chaplain-led worship of a particular style designed to meet the needs inclusive of several denominations and/or a broad population. Chaplain leadership ensures attentiveness to needs and sensitivity to the diversity of those attending these worship services. Services must be advertised and promoted by style, character, and doctrinal content.

This was not always the case. Anne Loveland describes the conflict over the “Unified Protestant Sunday School Curriculum,” adopted in the 1950s. LOVELAND, *supra* note 250, at 85-86, 90-94.

³¹² 10 USC § 6031(a) (Navy). See also AF INSTR. 52-101, *supra* note 253, at § 3.2.2.1; AR 165-1, *supra* note 10, para. 4.4.e.

³¹³ HUTCHESON, *supra* note 238, at 26.

comes solely from the chaplain's religious body and the chaplain acts in the name of that body, not in the name of the military, when leading worship.³¹⁴

This delegation of responsibility for worship could create tension with the underlying justification for the chaplaincy because the particular religious commitments of chaplains might conflict with the military's broader goal of accommodating service members' free exercise of religion. Two such conflicts over worship have arisen in recent years—the first involving the concept of pluralism and the second involving the practice of “collective Protestant worship.”

a. The Varieties of Religious Pluralism

Department of Defense regulations require chaplains and endorsing bodies to affirm that the ministry of chaplains takes place in a context of religious pluralism.³¹⁵ Army chaplain candidates are required to endorse the following statement:

While remaining faithful to my denominational beliefs and practices, I understand that, as a chaplain, I must be sensitive to religious pluralism and will provide for the free exercise of religion by military personnel, their families, and other authorized personnel served by the Army.³¹⁶

This injunction to “sensitivity” provides little guidance on how chaplains should relate their individual faith commitments, which might include beliefs about the exclusive efficacy of their faith, to the religious beliefs of others, which the chaplain might believe to be erroneous or even sinful.

The question of pluralism became concrete in a recent lawsuit, *Veitch v. England*,³¹⁷ which involved a former chaplain's claim of religious discrimination.³¹⁸ The lawsuit was brought by Reverend Veitch, an ordained minister in the Reformed Episcopal Church, who had served as a chaplain in the Navy.³¹⁹ Veitch alleged that his supervisor, Chaplain (Capt.) Buchmiller, who was a Roman Catholic priest, was hostile to conservative and evangelical Protestants.³²⁰ In particular, Veitch claimed that Buchmiller criticized the content of his ser-

³¹⁴ *Id.* at 26, 29.

³¹⁵ DOD DIR. 1304.19, *supra* note 8, para. 4.2 (“Religious Organizations that choose to participate in the Chaplaincies . . . express willingness for their Religious Ministry Professionals (RMPs) to perform their professional duties as chaplains in cooperation with RMPs from other religious traditions.”).

³¹⁶ Office of the Chief of Chaplains Form 13, “Statement of Understanding of Religious Pluralism in the U.S. Army” (copy on file with authors and WEST VIRGINIA LAW REVIEW).

³¹⁷ 471 F.3d 124 (D.C. Cir. 2006).

³¹⁸ *Id.* at 125-26.

³¹⁹ *Id.* at 125.

³²⁰ *Id.* at 125-27.

mons, and especially Veitch's preaching of "*sola scriptura*"—a doctrine of the supremacy of scripture to all other sources of divine authority and guidance.³²¹ Buchmiller said that his criticisms were directed toward Veitch's denigration of other chaplains, including alleged references to them as "unregenerate," rather than to Veitch's doctrinal preaching.³²² Buchmiller told Veitch "not 'to imply that everyone else is wrong,' or that 'you are the only source of the truth with implications that our other chaplains have no valid theology.'"³²³

After a series of increasingly contentious exchanges, Veitch filed an employment discrimination complaint.³²⁴ The investigating officer found that Veitch had "engaged in non-pluralistic activity as evidenced by his sermons and his statements to the inquiry officer."³²⁵ The officer's report gave the following definition of pluralism:

Pluralism is a well-established doctrine encompassing both ethical . . . administrative . . . and practical standards . . . in the USN Chaplain Corps. The basic tenant [sic] of pluralism has a long history in the Chaplain Corps. . . . In laymen's terms the Navy Chaplain must minister to all faiths in such a manner to be inclusive . . . to all and unoffensive . . . to all Navy personnel.³²⁶

Based on the investigating officer's report, the Navy dismissed Veitch's claim.³²⁷ When relations between Veitch and Buchmiller deteriorated further, the Navy relieved Veitch of his pastoral duties and charged him with insubordination.³²⁸ Among other things, the charging officer's report stated that Veitch "[w]as removed from [the] pulpit for failure to preach pluralism among religions."³²⁹ Veitch resigned his commission in the Navy before his court martial on the charges, although he later tried (unsuccessfully) to revoke his resignation.³³⁰

In his lawsuit, Veitch alleged that his resignation had been coerced through violations of the Establishment, Free Exercise and Speech Clauses of

³²¹ Veitch v. England, No. 00-2982, 2005 U.S. Dist. LEXIS 6257, *6-*9 (D.D.C.) (*aff'd*, 471 F.3d 124 (D.C. Cir. 2006)). On the Reformation doctrine of "scripture alone," see MARTIN LUTHER, SMALCALD ARTICLES, Art. 2, l.15, in THE BOOK OF CONCORD: THE CONFESSIONS OF THE EVANGELICAL LUTHERAN CHURCH 295, 304 (Robert Kolb & Timothy J. Wengert eds., Charles Arand trans et.al. (2000)).

³²² *Id.* at *6-*7, *31-32.

³²³ *Id.* at *8 (quoting an e-mail from Buchmiller to Veitch, Nov. 13 1998).

³²⁴ *Id.* at *9.

³²⁵ *Id.* at *10.

³²⁶ *Id.*

³²⁷ *Id.* at *16.

³²⁸ *Id.* at *17-*20.

³²⁹ *Id.* at *19.

³³⁰ *Id.* at *21.

the Constitution, as well as the Religious Freedom Restoration Act (RFRA) and other statutory protections.³³¹ At bottom, Veitch argued that the “pluralism” enforced by his Navy superiors represented an unconstitutional “establishment of religion,” and that the Navy’s sanctions against him for failing to comply with this official orthodoxy violated his rights to practice his religious beliefs “according to the manner and forms” of the religious body that endorsed his ministry.³³²

The district court and the U.S. Court of Appeals for the D.C. Circuit avoided, on slightly different grounds, what they acknowledged to be the difficult set of constitutional questions raised by Veitch’s claim of mandatory pluralism.³³³ The courts determined that the Navy did not coerce Veitch’s resignation, and therefore he had suffered no personal injury from the Navy’s policy on religious pluralism.³³⁴

The court in *Veitch* may have avoided the difficult constitutional questions, but the issues are likely to return. From the facts in the case, the Navy’s policy of religious pluralism can be assigned a range of possible meanings, each with slightly different constitutional implications. We describe the outer boundaries of this range as “maximal” and “minimal” pluralism.

i. Maximal Pluralism

This most robust understanding of pluralism seems to be reflected in the charging officer’s finding that Veitch “was removed for failure to preach pluralism among religions.”³³⁵ Although the officer did not elaborate on the duty to “preach pluralism among religions,” it might be taken as a theological truth claim, asserting the equal validity of all faith commitments.³³⁶ This truth claim of maximal pluralism could be a subtle form of universalism, such as that captured by the sentiment that “we are all on different paths with the same destination.”³³⁷ Alternatively, maximal pluralism might rest on a more relativistic assertion that all faith traditions rest on equally unverifiable, subjectivist beliefs.³³⁸

³³¹ *Id.* at *1-*2.

³³² *Id.* See also Aden, *supra* note 4, at 225-229.

³³³ *Veitch*, 2005 U.S. Dist. LEXIS 6257, at *48-*53 (ruling that Veitch lacked standing to raise the constitutional claim); *Veitch*, 471 F.3d at 131-32 (ruling that the Navy acted reasonably in denying Veitch’s request to withdraw his resignation).

³³⁴ *Veitch*, 2005 U.S. Dist. LEXIS 6257, at *26-*53; *Veitch*, 471 F.3d at 127-32.

³³⁵ *Veitch*, 2005 U.S. Dist. LEXIS 6257, at *19.

³³⁶ See generally Paul Otterstein, *Theological Pluralism in the Air Force Chaplaincy*, MIL. CHAPLAINS REV. 89 (Fall 1987).

³³⁷ *Id.* at 110-11 (discussing JOHN HICK, *GOD HAS MANY NAMES* (1980)). See also GEORGE A. LINDBECK, *THE NATURE OF DOCTRINE: RELIGION AND THEOLOGY IN A POSTLIBERAL AGE* 22-23, 52-53 (Westminster Press 1984) (discussing universalist implications of expressive-experientialist models of faith).

³³⁸ *Id.* at 109. This form of pluralism is better characterized as religious relativism in that it recognizes essential differences between faiths, but denies that any one faith is—or could

In both its universalist or relativist modes, however, maximal pluralism represents a substantive and highly contested set of religious commitments.³³⁹

Officially compelled proclamation of these religious commitments would raise serious problems under both the Establishment and Free Exercise Clauses.³⁴⁰ The establishment questions return us to the framework of accommodation, which provides the warrant for government-sponsored religious activity.³⁴¹ Viewed in that light, the chief issue raised by the concept of maximal pluralism is whether the affirmative obligation to preach a specific religious message responds to a government-imposed burden on free exercise. The identity of any such burden escapes our imagination. Instead, the Navy's purported duty to "preach pluralism" would likely arise from just the sort of problem underlying the *Veitch* lawsuit—religious conflict among chaplains and service members exacerbated by inflammatory preaching. The mandate of preaching pluralism, then, would turn the religious message into an instrument of military policy. While the goal may be laudable, the intentional, governmental promotion of specific religious messages to further policy goals violates a core component of the non-establishment guarantee. In promoting specific religious doctrines, the government has essentially proclaimed itself competent to judge the religious superiority of such doctrines.³⁴² Regardless of the secular efficacy of the doctrines, this course of action is a violation of government's constitutional obligation of neutrality among religions, as well as its jurisdictional limitation to temporal matters.³⁴³

An affirmative duty to "preach pluralism" would also be seriously vulnerable to free exercise or free speech challenges by chaplains. The strength of these claims, however, depends on a closer examination of the peculiar role held by military chaplains. Apart from that role, the First Amendment would undoubtedly prohibit the government from requiring religious leaders to profess a specific doctrine.³⁴⁴ In addition to the Establishment Clause objections dis-

be—superior to another. WILLIAM R. HUTCHISON, *RELIGIOUS PLURALISM IN AMERICA: THE CONTENTIOUS HISTORY OF A FOUNDING IDEAL* 233-240 (Yale University Press 2003); LINDBECK, *supra* note 337, at 48-49 (on possible incommensurability of religious languages).

³³⁹ See generally LINDBECK, *supra* note 337, at 1-26.

³⁴⁰ The free exercise problems would implicate speech clause concerns about compelled speech as well. See generally Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147 (2006).

³⁴¹ See *supra* notes 201-18 and accompanying text (describing the general framework for assessing religious accommodations).

³⁴² Madison's Memorial & Remonstrance Against Religious Assessments, quoted with approval by the Supreme Court in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), specifically criticizes any government policy which makes "the Civil Magistrate . . . a competent Judge of Religious truth," because such a policy "is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world . . ." *Id.* at 41 n.31, 67.

³⁴³ Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 83-84 (2002).

³⁴⁴ *Wooley v. Maynard*, 430 U.S. 705 (1977); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

cussed above, the requirement would also constitute “compelled speech,” which is tested against a very strict constitutional standard.³⁴⁵ To justify such compulsion, the government must show that its speech requirement is the least restrictive means of achieving a compelling governmental interest.³⁴⁶ While the avoidance of interreligious conflict within military units might well be considered a compelling government interest, especially in light of courts’ traditional deference to military judgments in such matters, the mandatory preaching of religious pluralism is unlikely to be accepted as the least restrictive means of furthering that interest. Military officials have many other and less intrusive means of addressing religious conflict short of mandating proclamation of specific religious messages.³⁴⁷ Unless all those means were shown to be unavailing, courts would be very unlikely to uphold the practice.

The religious speech of military chaplains, however, is not identical to the religious speech of private persons because chaplains conduct worship in the course of their official military duties. In *Garcetti v. Ceballos*,³⁴⁸ the Supreme Court recently held that a government employee does not enjoy First Amendment protections when the speech in question is directly job-related.³⁴⁹ *Garcetti* suggests that the speech of chaplains, even in worship, might be construed as expression by the government rather than private expression.³⁵⁰ If that view holds, the problem of compelled speech disappears. Whatever the authority of government to compel private parties to speak, the First Amendment is no bar to the government ordering its own agents to deliver particular messages.

Even if *Garcetti* undermines the free speech objection to compelling chaplains to preach a message of religious pluralism, however, chaplains have other potential objections to such compulsion. First, the government assures chaplains and their endorsing agencies that, in the words of the Army regulation, “[c]haplains will not be required to take part in worship when such participation is at variance with the tenets of their faith.”³⁵¹ If a chaplain’s religious commitments conflict with proclamation of the message of robust religious plu-

³⁴⁵ See generally Alexander, *supra* note 340.

³⁴⁶ *Wooley*, 430 U.S. at 715-17.

³⁴⁷ Such means could include, for example, mandatory training of all personnel in inter-religious sensitivity, or rigorous enforcement of norms against religious discrimination.

³⁴⁸ 126 S. Ct. 1951 (2006).

³⁴⁹ *Id.* at 1960-62.

³⁵⁰ *Id.* at 1960 (“Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”). We recognize the limits and complexity of this claim. Unlike the government lawyer at issue in *Garcetti*, military chaplains engage in religious expression on behalf of specific individuals who voluntarily attend the chaplains’ services. In this respect, the government’s actual interest in the expression of chaplains is less direct than its interest in the expression of lawyers who represent the government—the expression of chaplains serves the needs of the government to the extent that it responds to the religious needs of service members.

³⁵¹ AR 165-1, *supra* note 10, at para. 4.4.e.

ralism, the military would seem bound to respect its original promise—although that might result only in the chaplain's excused absence from preaching or leading worship.

Second, and more importantly, the religious content of faith group worship renders such speech fundamentally different from ordinary acts of government employees' job-related expression. One district court decision, *Rigdon v. Perry*,³⁵² takes a broad view of this distinction between the speech of chaplains and that of other government employees.³⁵³ In *Rigdon*, military chaplains challenged a ruling that prohibited them from urging chapel parishioners to lobby members of Congress about pending antiabortion legislation.³⁵⁴ The court held that the religious speech of chaplains, delivered to congregants, does not represent the use of official authority to engage in partisan political authority because, in that context, chaplains do not speak in any "official" capacity.³⁵⁵ Using the same standard that would be applied to content-based regulation of private speech, the court ruled that the restrictions at issue were not the least restrictive means of advancing a compelling governmental interest and invalidated the restrictive ruling.³⁵⁶

Despite the language in *Rigdon*, the decision does not stand for the proposition that the speech of chaplains in faith group worship is equivalent, for purposes of constitutional analysis, to private religious speech.³⁵⁷ Instead, the decision interprets specific restrictions on the content of official speech and finds that the policies underlying the restrictions do not apply to the religious speech of chaplains in the context of faith group worship. The policies at issue involved concerns about undue influence by military superiors and the public perception of a politicized military.³⁵⁸ The court ruled that chaplains do not exercise military command authority, and thus do not present the risk of undue influence that justified the regulation.³⁵⁹ The court also dismissed the military's concerns about the political involvement of chaplains, finding that the services

³⁵² 962 F. Supp. 150 (D.D.C. 1997).

³⁵³ *Id.* at 159 ("While military chaplains may be employed by the military to perform religious duties, it does not follow that every word they utter bears the imprimatur of official military authority . . ."). It is important to note, however, that the military has significantly amended the regulations on which the *Rigdon* court relied for this argument. Compare the regulations cited *id.* at 159, with current versions of AR 165-1, *supra* note 10, para. 4.3 to 4.4 (eliminating reference to the representative role of chaplains).

³⁵⁴ *Rigdon*, 962 F. Supp. at 159.

³⁵⁵ *Id.* at 159-160.

³⁵⁶ *Id.* at 161-62.

³⁵⁷ Indeed, in *Veitch*, the D.C. Circuit panel expressly questioned *Rigdon*'s conclusion about the official status of chaplains. 475 F.3d at 130 (distinguishing "*Rigdon*, even if correctly decided (which we doubt) . . .").

³⁵⁸ *Rigdon*, 962 F. Supp. at 156-159.

³⁵⁹ *Id.* at 160.

regularly tolerate more robust political expression than the chaplains' conduct at issue in the case.³⁶⁰

A chaplain's speech in faith group worship, then, falls in a unique netherworld between a government employee's job-related speech (restrictable under *Garcetti*) and the expression of a private individual (protected against compulsion by *Wooley* and *Barnette*). As such, the military may well have a degree of latitude in restricting the content of chaplains' religious speech—even in faith group worship—but the restrictions will need to relate specifically to the chaplain's government-sponsored role. In other words, the chaplain acts as an agent of the government even in the course of faith group worship, but the agency relationship is limited to the purpose of accommodating service members' free exercise of religion.³⁶¹ If the chaplain's religious speech undermines or otherwise departs from that purpose, the military should be able to take remedial action without needing to satisfy the strict scrutiny applied in *Wooley* or even *Rigdon*.

Seen in light of that modified speech inquiry, the requirement to "preach religious pluralism" represents a closer case than the restrictions on political activity in *Rigdon v. Perry*. Chaplains may not exercise the type of command that invites concerns about undue influence, but chaplains are responsible for facilitating all service members' access to religious experience, and the military may appropriately conclude that such responsibility requires an attitude of equal respect for all faiths, manifest in all of the chaplain's activities.

Whether or not a chaplain's statutory or constitutional rights preclude the military from ordering him or her to lead worship in a particular, pluralistic way, we think that the Establishment Clause forbids the proclamation of an official theology of the armed forces, whether it be Christianity, religious pluralism or a crude claim that God supports the military policies of the United States. If we are correct about this, courts would not have to reach the questions of a chaplain's rights under any other source to enjoin the imposition of a duty to preach such an official theology.

ii. Minimal Pluralism

If the context of preaching in faith group worship represents the maximal claim of required pluralism, the minimal claim involves what might better be called an attitude of "pragmatic pluralism," manifest in aspects of the chaplain's role outside of faith group worship. Unlike the maximal version, the minimal obligation does not require affirmative assent to or expression of theological truth claims. Instead, the minimal obligation focuses on the chaplain's performance of specific acts, such as the maintenance of working relationships with fellow chaplains, and the chaplain's diligence in facilitating all service

³⁶⁰ *Id.* at 162.

³⁶¹ Contrast with *Rigdon*, in which the court suggests that speech of chaplain in worship should be characterized as private speech within a limited public forum. *Id.* at 162-65.

members' religious needs on an equal basis. This minimal or pragmatic understanding of pluralism was also manifest in *Veitch v. England* because the military alleged that Veitch denigrated other chaplains and other faiths even outside of faith group worship, and failed to cooperate in projects of shared ministry.³⁶²

In stark contrast to the constitutional vulnerability of maximal pluralism, the pragmatic version rests on a solid constitutional foundation. As noted earlier, chaplains and their endorsing bodies affirm that military chaplaincy takes place in a religiously pluralistic environment, and that chaplains are expected to respect and further the free exercise interests of all service members without regard to specific religious commitments.³⁶³ A chaplain that denigrates other faiths and undermines the ministry of fellow chaplains acts in direct contradiction to the basic justification for the chaplaincy itself. In requiring chaplains to practice "pragmatic pluralism," the military does not establish a particular version of religious truth, but instead directs its officers to perform the legitimate secular work of accommodating religion.

Free exercise or speech claims by chaplains challenging pragmatic pluralism would be similarly weak, at least outside the context of faith group worship. Although we questioned the application of *Garcetti* to faith group worship, the reasoning adopted by the Court should apply without reservation to the official conduct of chaplains outside of such worship.³⁶⁴ When chaplains engage in professional activities outside of worship and related religious activities such as instruction and counseling, their role as agents of the military takes precedence over those aspects of the role more properly seen as a delegation from their religious bodies. In these broader professional activities, the job-related speech of chaplains should be under the same strict controls as job-related speech of other military officers.

A chaplain might assert that RFRA, which prohibits the federal government from substantially burdening religious exercise unless the burden is necessary to accomplish a compelling governmental interest, protects his or her right to resist the dictates of minimal pluralism and its corollary of equal religious respect for all service members.³⁶⁵ RFRA-based arguments by chaplains would fail, however, for want of a substantial burden, or on the strength of the government's interest in avoiding disharmony among service members.³⁶⁶ A

³⁶² *Veitch*, 2005 U.S. Dist. LEXIS 6257, at *36-*38.

³⁶³ DOD INSTR. 1304.28, *supra* note 9, para. 6.1.3.

³⁶⁴ See *supra* notes 348-61 and accompanying text.

³⁶⁵ Indeed, this is the best way to interpret Veitch's underlying claim in his lawsuit—a claim that did not need to be reached because of his resignation from the Navy. *Veitch*, 2005 U.S. Dist. LEXIS 6257, at *49-*50.

³⁶⁶ This assumes, of course, that a court would apply RFRA's ordinary standards to a case involving the military. But there is every reason to believe that the more lenient standard of *Goldman v. Weinberger*, which provides great deference to military judgments, would govern application of RFRA in the military context because RFRA is designed to restore religious liberty to its pre-*Smith* status, and that status includes *Goldman* deference. See *Larsen v. U.S. Navy*, 486 F. Supp. 2d 11, 25-30 (D.D.C. 2007).

chaplain who originally agrees to work within a religiously pluralist environment is not likely to receive a sympathetic hearing if the chaplain later asserts that conscientious performance of religious duties requires active denigration of other chaplains or faiths. The voluntary acceptance of the role undercuts the idea that the limits imposed on the chaplaincy constitute a “substantial burden” on the religious freedom of its occupants.³⁶⁷

Even if a court agreed that a mandatory practice of pragmatic pluralism constitutes a substantial burden on the chaplain’s religious exercise, the court would certainly find that the government has a compelling interest in prohibiting religious disparagement by those commissioned to facilitate religious practices of all service members. Such disparagement could reasonably be seen as a threat to the cohesion of military units, and also as an obstacle to service members’ access to religious services, especially if the chaplain’s disrespectful attitude leads service members to avoid seeking his or her assistance, or the assistance of other chaplains. Unlike the concerns at issue in *Rigdon*, these threats are concrete, significant and closely related to the restrictions imposed on chaplains’ expression.³⁶⁸

iii. Pragmatic Pluralism in the Context of Faith Group Worship

The most difficult and interesting questions arise in the context of faith group religious activities and involve express or implied denigrations of other faiths. If the military may not require chaplains to embrace religious pluralism as a theological truth claim, may the military nonetheless prohibit chaplains from disparaging other faiths in the course of faith group worship or instruction? This issue is most likely the one that would have been litigated had Veitch been granted standing to bring his constitutional challenges.³⁶⁹ Although the investigating and charging officers (who were line officers, not chaplains) asserted the more robust form of pluralism, Veitch’s chaplain supervisor seemed to assert a more modest form.³⁷⁰ In response to Veitch’s claim that he was being disciplined for preaching the doctrine of *sola scriptura*, the supervisor, Buchmiller, said, “I had no problem with Sola Scriptura as long as he was not being divisive and destroying the reputation of the other chaplains.”³⁷¹

³⁶⁷ See, e.g., *Smith v. Fair Employment & Hous. Comm’n*, 913 P.2d 909, 925-26 (Cal. 1996) (obligation to rent on equal terms to unmarried couples imposed no substantial burden on landlord’s free exercise because landlord’s religion did not compel her to provide rental housing, and she was free to withdraw from the rental housing market and invest her resources elsewhere).

³⁶⁸ *Rigdon v. Perry*, 962 F. Supp. 150, 162 (D.D.C. 1997) (chaplains’ speech about the morality of pending abortion legislation does not present a credible threat to the “loyalty, discipline, or morale of [the] troops”).

³⁶⁹ *Veitch*, 2005 U.S. Dist. LEXIS 6257, at *4-*6.

³⁷⁰ *Id.* at *6-*7.

³⁷¹ *Id.* at *7.

Buchmiller's response demonstrates the challenge of enforcing pragmatic pluralism in the worship setting. Veitch asserted that his faith required the preaching of "scripture alone," but the doctrine—a core commitment of the Protestant Reformation—necessarily implies the error of other faith traditions, most specifically that of Roman Catholicism, which recognizes a broader ground of religious authority.³⁷² Thus, the complaint that Veitch's preaching was "anti-priest" likely reflects the chaplain's rejection of religious authority as mediated by the church, a proclamation wholly bound up with another core conviction of the Reformation, *sola gratia* ("by grace alone"), which also rejects the mediation of ecclesial authority.³⁷³

The Protestant-Roman Catholic division reflected in *Veitch* is hardly anomalous. Most faith traditions define themselves, at least in part, through a denial of other beliefs. From the *Shahadah* said by Muslims to the *Shema* of Jews to the Athanasian Creed (*Quicumque vult*) of Christians, confessions explicitly or implicitly commit adherents to disavow other faiths.³⁷⁴ Of course, the manner in which a chaplain preaches or teaches the exclusivist message is likely to be the trigger for military regulation or discipline, not the mere fact that the chaplain has asserted the exclusive efficacy of one faith tradition. For example, the military might not attempt to regulate the recitation of creeds, liturgy or scripture verses that contain exclusivist claims, but might have a different attitude toward chaplains that overtly and specifically condemn the faith traditions of others. A particularly vivid example of the latter would be Martin Luther's depiction of the Roman Catholic Church, and especially the office of the papacy, as the "Whore of Babylon."³⁷⁵

Was Chaplain Buchmiller on solid constitutional ground when he admonished Veitch not to preach exclusivist doctrine in a manner that was "divisive" and "destroy[ed] the reputation of other chaplains"?³⁷⁶ We described above the proper framework for judicial review of such a question.³⁷⁷ While leading faith group worship, the chaplain is simultaneously an agent of an endorsing organization—and thus a private individual—and an officer of the government. Although the specific religious acts in worship are not attributable to

³⁷² JAROSLAV PELIKAN, 4 THE CHRISTIAN TRADITION: REFORMATION OF CHURCH AND DOGMA (1300-1700) 167-82 (Univ. of Chicago Press 1983).

³⁷³ *Id.* at 138-55.

³⁷⁴ JAROSLAV PELIKAN, CREDO: HISTORICAL AND THEOLOGICAL GUIDE TO CREEDS AND CONFESSIONS OF FAITH IN THE CHRISTIAN TRADITION 186-215 (Yale Univ. Press 2003) (on creedal anathemas). See also *id.* at 330-35 (on the *Shema* of the book of Deuteronomy); OXFORD DICTIONARY OF ISLAM 286 (John L. Esposito ed., Oxford Univ. Press 2003) (on the *Shehadah* of Islam).

³⁷⁵ JAMES M. KITTELSON, LUTHER THE REFORMER: THE STORY OF THE MAN AND HIS CAREER 276-77 (Fortress Press 2003); BERNARD LOHSE, MARTIN LUTHER: AN INTRODUCTION TO HIS LIFE AND WORK 88-89 (Robert C. Schultz trans., Fortress Press 1986).

³⁷⁶ *Veitch*, 2005 U.S. Dist. LEXIS 6257, at *7.

³⁷⁷ See *supra* notes 341-61 and accompanying text.

the government, the government nonetheless retains an important interest in how the chaplain's role is conducted. In other words, the chaplain remains an instrument of government policy even in the act of leading faith group worship. The policy, broadly stated, is the government's purpose of accommodating service members' religious exercise in a way that does not cause destructive disharmony within the service.³⁷⁸ The government, acting through military superiors, may regulate all facets of the chaplain's performance in order to ensure that the chaplain is meeting the religious needs of service members, and doing so within the religiously pluralist environment of the military.

Thus, Veitch's supervisor would have two independent grounds for admonishing the chaplain for his divisive proclamation of exclusivist doctrines. First, the military has an interest in ensuring that the religious convictions of all service members are accorded equal respect; pastoral injunctions to denigrate the beliefs of others may create an atmosphere of religious intolerance. Second, the military has an interest in maintaining "individual and unit readiness, health and safety, discipline, morale, and cohesion."³⁷⁹ Divisive preaching and religious instruction may pose a legitimate threat to unit morale and cohesion, especially if the religious claims relate to the moral character and trustworthiness of non-adherent fellow service members.

To justify regulation of a chaplain's conduct in faith group worship, the military would need to show that the specific manner of proclamation, and not merely the content of the doctrine, materially harmed or threatened the military's interests. Such regulation would not present the establishment clause problems noted in connection with maximal pluralism because the military would not be requiring chaplains to preach a specific doctrine, or even forbidding proclamation of a faith tradition's exclusivist confession. Instead, the military would only specify that proclamations must not specifically denigrate the religious beliefs of others.³⁸⁰

Free exercise or free speech claims by chaplains opposed to such restriction likely would be resolved on the question of the government's interest in regulating the speech, and on the specific means used to further that interest. In this respect, the traditional concerns about mechanisms for regulating speech, such as the clarity of the restriction, the extent of discretion accorded to officials charged with regulating the speech and opportunities for prompt review of offi-

³⁷⁸ Seen in this light, the chaplaincy falls under the military's general policy for accommodation, as reflected in DOD DIR. 1300.17, *supra* note 221. This directive limits any accommodations that would "have an adverse impact on military readiness, unit cohesion, standards, or discipline." *Id.* at para. 3.1. In *Larsen v. U.S. Navy*, the court emphasized the chaplain's role as an instrument of the government's permissive accommodation of service members' religious needs – a role that circumscribes the chaplain's assertion of his or her own rights to religious liberty in the exercise of that office. 486 F. Supp. 2d 11, 33-34 (D.D.C. 2007).

³⁷⁹ DOD DIR. 1300.17, *supra* note 221, para. 4.1.1.

³⁸⁰ For a vigorous defense of the idea that the Establishment Clause forbids government-sponsored denigration of anyone's religious beliefs, see CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 124-128 (Harvard Univ. Press 2007).

cials' decisions, would all be important. Those concerns, however, are more likely to involve the manner in which the military implemented the restriction, rather than the possibility that some type of restriction could withstand substantive constitutional scrutiny. Buchmiller may well have stood on solid ground in his admonitions to Veitch.

b. Collective Protestant Worship

The practice of faith group worship raises a very different set of constitutional questions in the context of a common practice, the "Collective Protestant" worship service.³⁸¹ Because of the broad array of Protestant denominations, it is sometimes impossible—and frequently inefficient—to plan regular chapel worship for a single Protestant denomination, or to prepare for distinctive rites such as baptism or confirmation.³⁸² Instead, chapel programs typically offer a "Collective Protestant" worship service in which a chaplain from one denomination leads worship for congregants representing a broad array of traditions.³⁸³ It is possible, and perhaps even likely for chaplains coming from smaller denominations, that none of the congregants would be from the chaplain's faith group.

The constitutional issues surrounding Collective Protestant worship all stem from the one distinctive feature of the practice: there is no religious body called "Collective Protestantism," so the military chaplaincy creates a religious community, and in the process decides on the hymnody and liturgy of this military religious community.³⁸⁴ This contrasts sharply with Roman Catholic worship, and to a somewhat lesser degree with Jewish and Orthodox Christian worship, all of which involve forms and content of worship that are proscribed by tradition or ecclesial authority outside the military.³⁸⁵ In our earlier discussion of the chaplain's role in leading worship we focused on the extent to which the chaplain derived religious authority from an endorsing body, not from the government. When the military determines, however, that worship should be conducted in a way that includes a wide range of Protestant denominations, the institutional responsibility for the worship might reasonably be thought to shift from the chaplain's endorsing body to the military chaplaincy itself. Such a

³⁸¹ HUTCHESON, *supra* note 238, at 86-87; Kenneth W. Bush, *Military Worship Wars: Blended Worship as a Pastoral Response*, THE ARMY CHAPLAINCY (Winter-Spring 2003), <http://www.usachcs.army.mil/TACarchive/ACwinspr03/bush.htm>; S. David Chambers, *The Protestant Problem*, MILITARY CHAPLAINS REVIEW 81, 84-85 (Fall 1987); Wildhack, *supra* note 4, at 234-35.

³⁸² Different faith groups may gather separately and regularly for special occasions. Chambers, *supra* note 381, at 83-84.

³⁸³ HUTCHESON, *supra* note 238, at 87.

³⁸⁴ Chambers, *supra* note 381, at 84-85.

³⁸⁵ *Larsen*, 486 F. Supp. 2d at 35 (on difference between worship needs of Protestants and Roman Catholics).

shift would render the chaplaincy more vulnerable to establishment clause challenge because it suggests that the government has become the author of religious experience, rather than simply the provider of opportunities for religious experiences authored or directed by others.

Although the concern is theoretically reasonable, the actual practice of Collective Protestant worship suggests that the concern is misplaced, or at least overstated. Chaplains themselves determine the form of worship that a particular Collective Protestant worship service will use.³⁸⁶ The military does not specify an order of worship, liturgy or set of hymns, although the chaplaincy publishes worship materials with options that chaplains may select.³⁸⁷ Chaplains may adopt materials exclusively from their own tradition, but they generally select worship styles that will appeal to congregants from a wide array of denominations.³⁸⁸ As Hutcheson notes, “The fact that most Protestant chaplains do make such adjustments is not an indictment but an indication of their desire to minister effectively.”³⁸⁹ He goes on to suggest that the Collective Protestant worship services reflects the present widespread permeability between Protestant denominations in the broader society, along with the growing number and size of non-denominational Protestant congregations.³⁹⁰ The significant diversity of worship styles even within a single Protestant denomination reinforce Hutcheson’s sense that the Collective Protestant worship experience mirrors the existing shape of American Protestant worship.³⁹¹

The practice is somewhat complicated when the Collective Protestant worship service involves multiple chaplains, with a superior making the final judgment about particular elements of the worship. Those disagreements might include preferences for greater or less formality in worship, the use of traditional hymns and musical accompaniment or contemporary songs and instrumentation, the frequency and practice of administration of sacraments, or a wide variety of other aspects of worship.³⁹² Such a “command decision” on the content of Collective Protestant worship, however, does not indicate an official establishment of “Collective Protestantism.” Instead, it demonstrates just one among many local and shifting settlements about how the worship should be conducted, arrangements that will shift further when existing chaplains depart and new chap-

³⁸⁶ Bush, *supra* note 381; Chambers, *supra* note 381, at 84-85, 88.

³⁸⁷ ARMED FORCES CHAPLAINCY BOARD, BOOK OF WORSHIP FOR UNITED STATES FORCES 574-90 (1974) (different versions of “Order of Worship, Protestant”).

³⁸⁸ Bush, *supra* note 381 (on homogenizing pressures within “General Protestant Worship”); Chambers, *supra* note 381, at 85-86 (tradition of appeal to broad consensus within Protestantism may have fractured).

³⁸⁹ HUTCHESON, *supra* note 238, at 86.

³⁹⁰ *Id.*

³⁹¹ See generally JAMES F. WHITE, PROTESTANT WORSHIP: TRADITIONS IN TRANSITION (Westminster John Knox Press 2006); RONALD P. BYARS, THE FUTURE OF PROTESTANT WORSHIP: BEYOND THE WORSHIP WARS (Westminster John Knox Press 2002).

³⁹² Wildhack, *supra* note 4, at 221.

lains arrive. These shifting practices should be driven primarily by an assessment of the needs of the worshiping community, although the chaplain will inevitably interpret those needs through the prism of the chaplain's own religious experience and faith tradition.³⁹³ Seen in this light, the Collective Protestant worship reflects a reasonable attempt by the military chaplaincy to respond to the diverse worship needs of Protestant Christians. Indeed, many chapels now offer a range of Collective Protestant worship experiences, including Praise (or Contemporary), Gospel (traditionally African-American), Liturgical and Hispanic Protestant.³⁹⁴

Chaplains may be excused from participating in Collective Protestant worship if they object, on grounds of religious conscience, to the form or content of the worship.³⁹⁵ Nonetheless, even Protestant faith traditions that have a long history of denominational distinctness often find ways in which their clergy may lead Collective Protestant worship. The practices of the Lutheran Church – Missouri Synod (LCMS) provide an especially useful example. The LCMS is well known for its opposition to current trends in Protestant ecumenism, which seeks to reduce or eliminate the distinctiveness of Protestant groups and has been especially influential among the “mainline” churches.³⁹⁶ In recent years, the LCMS made national headlines when it sought to discipline one of its pastors, Rev. Dr. David H. Benke, for his participation in an interfaith prayer services in the days following the September 11, 2001, attacks.³⁹⁷ Benke was charged with syncretism, for publicly praying with non-Christians and implying the equality of faiths.³⁹⁸ He was also charged with unionism, for praying with Christians outside the Lutheran confession and implying the equal truth of all Christian confessions.³⁹⁹ Although Benke was later acquitted of the charges, the episode reveals the depth of the LCMS tradition against participation in worship with non-Lutherans.⁴⁰⁰

³⁹³ HUTCHESON, *supra* note 238, at 87.

³⁹⁴ Chambers, *supra* note 381, at 83-84.

³⁹⁵ *Id.* at 86-87.

³⁹⁶ See generally LUTHERAN CHURCH-MISSOURI SYNOD, THE LUTHERAN UNDERSTANDING OF CHURCH FELLOWSHIP: A REPORT ON SYNODICAL DISCUSSIONS (2001), <http://www.lcms.org/graphics/assets/media/CTCR/chfellfinal.pdf> (discussing LCMS understanding of relationships among Christian church bodies).

³⁹⁷ Daniel J. Wakin, *Seeing Heresy In a Service For Sept. 11; Pastor Is Under Fire For Interfaith Prayers*, N.Y. TIMES, Feb. 8, 2002, at B1. See also Daniel J. Wakin, *Preparing to Take on His Church*, N.Y. TIMES, July 10, 2002, at B3.

³⁹⁸ Alan Cooperman, *New York Lutheran Leader Suspended; Synod Seeks Pastor's Apology for Praying With 'Pagans' After Sept. 11 Attacks*, WASH. POST, July 6, 2002, at A2.

³⁹⁹ *Id.*

⁴⁰⁰ Associated Press, *Lutheran Panel Reinstates Pastor After Post-9/11 Interfaith Service*, N.Y. TIMES, May 13, 2003, at B4.

Nonetheless, the LCMS has created a pattern of ministry for its endorsed military chaplains that makes significant room for pluralist practices.⁴⁰¹ The Synod's guidelines endorse the participation of LCMS chaplains in cooperative ministry with other chaplains "[a]s long as a LCMS chaplain is not directed to do anything contrary to the Holy Scriptures and the Lutheran Confessions."⁴⁰² Specifically, the LCMS chaplain may support or supervise the work of other, non-Lutheran chaplains, provide pastoral care to all service members and their families and facilitate the religious exercise of those of any faith.⁴⁰³ As long as the elements of worship do not contradict the church body's confessions, LCMS chaplains may lead Collective Protestant services.⁴⁰⁴ The LCMS chaplaincy guidelines limit this cooperation in two ways: LCMS chaplains should not lead worship, or participate in other religious services, with non-Lutheran clergy; and LCMS clergy should only lead communion services for Lutheran congregations.⁴⁰⁵ Thus, LCMS clergy can lead Collective Protestant services so long as the services do not involve shared pastoral leadership with non-Lutheran clergy, and as long as the service does not include communion.⁴⁰⁶ The guidelines urge LCMS chaplains to "cooperate with other chaplains who can fulfill denominational needs that they are unable to meet."⁴⁰⁷

Finally, the LCMS guidelines remind chaplains that, as a matter of the regulations covering chaplains in all branches of the military, they may decline to perform any religious acts that are contrary to the teachings of their faith.⁴⁰⁸ This right of all chaplains to object, on grounds of religious conscience, to participation in assigned religious tasks is an important aspect of the practice of Collective Protestant worship.⁴⁰⁹ This practice rests on voluntary cooperation by chaplains—and of course by congregants—in designing and participating in a worship service that typically includes parts of worship that are broadly shared among Protestant churches.⁴¹⁰

In this respect, the service represents a conscious tradeoff by both the chaplaincy and the military parishioners. They exchange the distinctiveness, but likely small numbers, of worship restricted to a particular denomination, for the diverse and more broadly attended experience of Collective Protestant wor-

⁴⁰¹ LUTHERAN CHURCH-MISSOURI SYNOD, CHAPLAIN GUIDELINES (Rev. 2004), <http://www.lcms.org/graphics/assets/media/World%20Mission/Chaplain-Guidelines.pdf>.

⁴⁰² *Id.* at 23.

⁴⁰³ *Id.* at 23-25.

⁴⁰⁴ *Id.* at 33.

⁴⁰⁵ *Id.* at 24-25.

⁴⁰⁶ *Id.* at 33-34. *See also* HUTCHESON, *supra* note 238, at 50.

⁴⁰⁷ LCMS CHAPLAIN GUIDELINES, *supra* note 401, at 25.

⁴⁰⁸ *Id.* at 24.

⁴⁰⁹ *See* AF INSTR. 52-101, *supra* note 253, at sec. 2.1; AR 165-1, *supra* note 10, at sec. 4-4.e.; OPNAV INSTR. 1730.1D, *supra* note 10, at sec. 5.e.(11).

⁴¹⁰ DRAZIN & CURREY, *supra* note 33, at 40-41; HUTCHESON, *supra* note 238, at 87.

ship.⁴¹¹ Chaplains remain willing to facilitate, where possible, the distinctive practices of Protestant bodies, as of other faith groups, but the Establishment Clause permits the military to facilitate arrangements for worship that involve non-distinctive approaches to prayer.

The practice of Collective Protestant worship raises one final question. If a Protestant chaplain refuses, on religious grounds, to lead Collective Protestant worship and restricts performance of religious acts to those of the chaplain's own faith group, may the military take such a refusal into account in evaluating the chaplain's fitness for continued service? The military services expressly permit chaplains to exercise such objections, so one might assume that the objections are not prejudicial to the chaplain's career.⁴¹² Although the military may take that approach, they are under no obligation to ignore the significance of objections. As noted above, the military decides on accessions (both into the chaplaincy of the Reserve Components, and also into Active Duty service) based, at least in part, on the specific religious needs of service members.⁴¹³ If a Protestant chaplain is willing to lead Collective Protestant worship, he or she will be able to serve a broader range of service members than a chaplain who is willing only to conduct worship for a specific Protestant denomination.⁴¹⁴ The military does not engage in impermissible religious discrimination if it takes a chaplain's attitude toward Collective Protestant worship into account so long as the decision is grounded on the underlying justification for the chaplaincy—the accommodation of service members' religious needs.

2. Prayer at Official Ceremonies

Over the past several years, the practice of public prayer by military chaplains has attracted more attention and controversy than any other aspect of the chaplaincy.⁴¹⁵ Controversy over the practice has focused on the singular question of whether chaplains may offer sectarian prayers at military ceremonies. More specifically, conservative and evangelical Protestant chaplains assert

⁴¹¹ HUTCHESON, *supra* note 238, at 86-87.

⁴¹² Chambers, *supra* note 381, at 86-87.

⁴¹³ See *Larsen v. U.S. Navy*, 486 F. Supp. 2d 11, 33-34 (D.D.C. 2007).

⁴¹⁴ Chambers, *supra* note 381, at 87.

⁴¹⁵ For legal commentary, see generally Dobosh, *supra* note 4; Rosen, *supra* note 4, at 1158-64. See also, e.g., Neela Bannerjee, *Proposal on Military Chaplains and Prayer Holds Up Bill*, N.Y. TIMES, Sept. 19, 2006, at A19; Alan Cooperman, *Chaplains Group Opposes Prayer Order; Guarantee on Using Jesus's Name Not Needed, It Says*, WASH. POST, Mar. 30, 2006, at A4. Controversy over prayer at military ceremonies is not merely a recent phenomena. See Arnold E. Resnicoff, *Prayers that Hurt: Public Prayer in Interfaith Settings*, MIL. CHAPLAINS' REV. (Winter 1987), http://www.resnicoff.net/prayers_that_hurt.htm; Betram Gilbert, *On Prayers in Jesus' Name*, MIL. CHAPLAINS' REV. 123 (Fall 1987); LOVELAND, *supra* note 250, at 307-09 (on disputes over public prayer in the early 1990s).

the freedom to pray “in the name of Jesus Christ,” regardless of the context in which the prayer is offered.⁴¹⁶

This question has produced an ongoing political and legal battle. In February 2006, both the Air Force and the Navy issued guidelines that included restrictions on the use of sectarian language in ceremonial prayer.⁴¹⁷ The Air Force guidelines arose from a broad review of religious practices and policies originally sparked by allegations of religious intolerance and inappropriate proselytizing at the Air Force Academy.⁴¹⁸ The guidelines provided the following advice concerning ceremonial prayers:

Public prayer should not imply government endorsement of religion and should not usually be a part of routine business. Mutual respect and common sense should always be applied, including consideration of unusual circumstances and the needs of the command. Further, non-denominational, inclusive prayer or a moment of silence may be appropriate for military ceremonies or events of special importance when its primary purpose is not the advancement of religious beliefs. Military chaplains are trained in these matters.⁴¹⁹

Later that same month, the Secretary of the Navy issued a new instruction covering a wide range of issues involving religion. This instruction carried similar advice regarding ceremonial prayer:

In planning command functions, commanders shall determine whether a religious element is appropriate. In considering the appropriateness for including a religious element, commanders, with appropriate advice from a chaplain, should assess the setting and context of the function; the diversity of faith that may be represented among the participants; and whether the function is mandatory for all hands. Other than Divine/Religious Services, religious elements for a command function, absent extraordinary circumstances, should be non-sectarian in nature. Neither the participation of chaplain, nor the inclusion of a reli-

⁴¹⁶ Editorial, *We Have a Mess! What Now MCA?*, 79 THE MIL. CHAPLAIN 5, 3 (Sept.-Oct. 2006); Julia Duin, *White House to Push Military on Jesus Prayer*, WASH. TIMES, Jan. 23, 2006, at A3; John B. Murdoch & Gary R. Pollitt, *Statement on Religious Free Exercise Controversies*, 79 THE MIL. CHAPLAIN 1, 3-4 (Jan.-Feb. 2006).

⁴¹⁷ U.S. DEP'T OF AIR FORCE, GUIDELINES, REVISED INTERIM GUIDELINES CONCERNING FREE EXERCISE OF RELIGION IN THE AIR FORCE (09 Feb. 2006) [hereinafter AF RI GUIDELINES], available at www.af.mil/library/guidelines.pdf; SEC'Y OF NAVY, U.S. DEP'T OF NAVY, INSTR. 1730.7C, RELIGIOUS MINISTRIES WITHIN THE DEPARTMENT OF THE NAVY (21 Feb. 2006) [hereinafter SECNAV INSTR. 1730.7C] (rescinded 26 Nov. 2006).

⁴¹⁸ See generally, Cook, *supra* note 4; Schweiker, *supra* note 4.

⁴¹⁹ AF RI GUIDELINES, *supra* note 417.

gious element, in and of themselves, renders a command function a Divine Service or public worship.⁴²⁰

Moreover, the Navy instruction explicitly assigned responsibility to commanders, rather than chaplains, for the content of ceremonial prayer. The Navy instruction continued:

Once a commander determines a religious element is appropriate, the chaplain may choose to participate based on his or her faith constraints. If the chaplain chooses not to participate, he or she may do so with no adverse consequences. Anyone accepting a commander's invitation to provide religious elements at a command function is accountable for following the commander's guidance.⁴²¹

Opponents of the new policies, both inside and outside the military, focused on both the content restrictions and the allocation of command authority.⁴²² These critics argued that the restrictions on prayer violated the rights of chaplains by forbidding them from praying in the manner required by their religious beliefs, and by subjecting the content of their prayers to oversight by military superiors.⁴²³ Led by the American Center for Law and Justice, Focus on the Family and a number of other conservative and evangelical Protestant organizations, opponents of the policies attracted the attention of federal legislators.⁴²⁴

In response to these efforts, a number of influential organizations came forward to actively support the Air Force and Navy policies. Both the National Association of Evangelicals and the National Conference on Ministry to the Armed Forces expressed their approval of inclusive prayer in ceremonial settings.⁴²⁵

Responding favorably to the conservative critique, the House approved legislation that would have given military chaplains "the prerogative to pray according to the dictates of the chaplain's own conscience, except as must be

⁴²⁰ SECNAV INSTR. 1730.7C, *supra* note 417 (rescinded 26 Nov. 2006 by direction of legislative conferees on Defense appropriations bill). See also Navy Chief of Chaplains, Official Statement on Public Prayer in the Navy (Jan. 2006) [hereinafter OPNAV Statement on Prayer], <http://www.religionandpolicy.org/show.php?p=1.1.1726&PHPSESSID=4ca36734aef750435952c8841a2ee6e> (last visited Sept. 4, 2007).

⁴²¹ *Id.*

⁴²² See Alan Cooperman, *A Noisy Takeoff for Air Force Guidelines on Religion; Evangelical Christians Contend Restrictions Imperil Free Exercise*, WASH. POST, Oct. 31, 2005, at A20.

⁴²³ *Id.*

⁴²⁴ American Center for Law & Justice, Update on Military Chaplains & Prayer, <http://www.aclj.org/News/Readwr.aspx?ID=2498> (last visited Sept. 29, 2007).

⁴²⁵ The National Association of Evangelicals, Statement on Religious Freedom for Soldiers and Military Chaplains (Feb. 7, 2006); NCMAF News Release (Feb. 9, 2006). These two groups represent a wide range of religious bodies that endorse military chaplains.

limited by military necessity, with any such limitation being imposed in the least restrictive manner feasible.”⁴²⁶ The Senate did not pass such a measure, and the House provision was dropped in conference over the 2007 Defense Appropriations Act.⁴²⁷ As a compromise between the contending forces, however, the conferees demanded that the Navy and Air Force rescind the policy directives concerning non-sectarian prayer at military ceremonies.⁴²⁸ In the wake of the legislative conferees’ direction to rescind the challenged policies, the Air Force and Navy reinstated the guidelines on chaplaincy that were in place before the 2006 revisions.⁴²⁹ The preexisting guidelines do not address the issue of ceremonial prayer, although a policy letter by the Navy Chief of Chaplains, which contains essentially the same instructions on ceremonial prayer as the rescinded guidelines, still appears to be in effect.⁴³⁰

The debate over chaplains’ ceremonial prayer raises questions of the chaplains’ asserted right to pray as their faith requires, as well as the potential Establishment Clause limitations on ceremonial prayers at certain military events. The context for both inquiries is the same. Military chaplains are regularly asked to provide an invocation or other prayer at a military command ceremony, such as a “dining in”⁴³¹ or change of command. The ceremony will usually include service members who are required to attend, and the chaplain will typically appear in military uniform (rather than worship vestments).⁴³² Finally, service regulations provide that chaplains are free to decline, without prejudice, invitations to pray at military ceremonies,⁴³³ though most chaplains acknowledge experiencing some degree of expectation that they will participate.⁴³⁴

⁴²⁶ H.R. 5122, Sec. 590(a).

⁴²⁷ See Howard M. Friedman, *Compromise on Chaplains in Defense Appropriations Act*, (Oct. 2, 2006), <http://religionclause.blogspot.com/2006/10/compromise-on-chaplains-in-defense.html>. See also Neela Bannerjee, *Chaplain Prayer Provision Cut From Military Spending Bill*, N.Y. TIMES, Oct. 1, 2006, at A1.

⁴²⁸ Conference Report, DW110-H590-Military Chaplains (Sept. 25, 2006).

⁴²⁹ SECNAV INSTR. 1730.7B, *supra* note 219 (Navy policy reinstated Nov. 26, 2006); AF POLICY DIR. 52-1, *supra* note 10 (Air Force policy reinstated Oct. 2, 2006).

⁴³⁰ OPNAV Statement on Prayer, *supra* note 420.

⁴³¹ A “dining in” ceremony is a formal (and highly ritualized) dinner of the military unit. See United States Military Academy, Guide to Military Dining-In, *available at* <http://www.usma.edu/Protocol/images/DiningInOutGUIDE.pdf>.

⁴³² AR 165-1, *supra* note 10, at sec. 4-4.d. (chaplains may wear religious vestments for worship services, but while otherwise on duty wear the military uniform; “chaplains scarf, stole, or tallit” are permitted in addition to the uniform). See also Dobosh, *supra* note 4, at 1532-34 (on mandatory attendance at military formations).

⁴³³ AR 165-1, *supra* note 10, at sec. 4-4.h. (“Military and patriotic ceremonies may require a chaplain to provide an invocation, reading, prayer, or benediction. Such occasions are not considered to be religious services. Chaplains will not be required to offer a prayer, if doing so would be in variance with the tenets or practices of their faith group.”).

⁴³⁴ Wildhack, *supra* note 4, at 245-46 & nn.186-87.

On the question of a chaplain's right to pray "according to the dictates of the chaplain's own conscience" as part of a military ceremony to which the chaplain has been invited, proponents of such a right have invoked a variety of different legal bases. These include the chaplain's constitutional or statutory rights to free exercise of religion and free speech;⁴³⁵ the regulatory or statutory provisions that authorize chaplains "to conduct rites, sacraments, and services as required by their respective denominations;"⁴³⁶ and asserted Establishment Clause limits on governmental endorsement of a theological position—in this case, the position associated with a requirement that ceremonial prayer be non-sectarian.⁴³⁷

With respect to the constitutional or statutory rights of expression and religious exercise, proponents of unrestricted prayer at ceremonies contend that the proposed policies reflect content-based regulation of speech and impose a substantial burden on chaplains' freedom to pray in their chosen manner. None of the proponents' arguments is persuasive. The free speech claim founders on the Supreme Court's decision in *Garcetti v. Ceballos*,⁴³⁸ discussed above, which held that government employees do not enjoy constitutional protection for job-related expression in the course of their employment.⁴³⁹ The only way that chaplains could avoid the implications of *Garcetti* would be to argue that ceremonial prayer is an act of private speech, but such a claim cannot be sustained in this context.⁴⁴⁰ The chaplain is invited to pray precisely because of the chaplain's official position, and the chaplain participates because such acts are deemed part of the chaplain's official role within the military.⁴⁴¹ While there are settings in which it might be reasonable to claim that a speaker invited to pray at a ceremonial function does so as a private individual, and thus enjoys some protection for the content of that prayer,⁴⁴² the ceremonial prayers of military chaplains possess none of those characteristics.

⁴³⁵ Arthur Schulcz, *Blow the Trumpet in Zion*, INT'L CONFERENCE OF EVANGELICAL CHRISTIAN ENDORSERS NEWSLETTER, Oct. 2006, at 3-5; Dobosh, *supra* note 4, at 1541-49.

⁴³⁶ AR 165-1, *supra* note 10, at sec. 4-4.e. The chaplains' lawyers have not pressed this argument in their written efforts on the subject. We surmise that they do not rely heavily on this provision because military ceremonies are not "rites, sacraments, or services" within its meaning.

⁴³⁷ Schulcz, *supra* note 435, at 3 ("The Navy has established an official Navy religion and violated the Establishment Clause's mandated government neutrality in the area of religion by defining 'nonsectarian' prayer as the only acceptable religious speech at Navy functions. The Establishment Clause forbids government to make pronouncements as to the rightness or wrongness of religious concepts or beliefs unless a religious doctrine dictates a practice clearly at odds with the norms of American civil society.").

⁴³⁸ 126 S. Ct. 1951 (2006).

⁴³⁹ *Id.* at 1962; see also *supra* notes 348-61 and accompanying text (discussing *Garcetti*).

⁴⁴⁰ But see Schulcz, *supra* note 435, at 4.

⁴⁴¹ See, e.g., AR 165-1, *supra* note 10, at 4.4.h. ("Military and patriotic ceremonies may require a chaplain to provide an invocation, reading, prayer, or benediction.").

⁴⁴² The argument would depend on the extent to which the invitation to deliver the prayer—and the broader context of the ceremony—might be reasonably understood to reflect the preferences

The most ambitious—but least plausible—argument under the Speech Clause is that prayer by chaplains at ceremonies *must* be private speech because official religious speech at such functions would violate the Establishment Clause.⁴⁴³ That argument, however, is completely self-serving and entirely illogical. It is akin to arguing that the display of the Ten Commandments in the McCreary County Courthouse must represent the private speech of the County Commissioners because the display would violate the Establishment Clause if it were attributed to the County.⁴⁴⁴ By this logic, all governmental expression in support of sectarian religion could be redefined as the private speech of some government official, and therefore be deemed free of Establishment Clause restrictions. There is no reason to expect courts to be persuaded by this sophistry; the law determines whether or not speech is public or private by looking at the context in which the speaker operates, not by the completely result-oriented technique of examining first the constitutional consequence of labeling speech as public or private.⁴⁴⁵

The free exercise claims of chaplains are no more compelling than the assertions of free speech rights. Proponents of faith-specific ceremonial prayer make two different kinds of arguments. One asserts that the restriction on sectarian prayer discriminates against Protestant evangelicals for whom prayer “in the name of Jesus” is a religious obligation.⁴⁴⁶ Such a definition of discrimination has no support in constitutional jurisprudence. The restrictions on ceremo-

of an individual (perhaps a person being honored in retirement) rather than the government. In *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103 (S.D. Ind. 2005), a case involving a challenge to sectarian prayers in the Indiana legislature, appellants have raised the private speech forum argument in their briefs defending the practice. *Hinrichs* remains pending on appeal in the 7th Circuit. Religion Clause, *7th Circuit Hears Arguments in Indiana Legislative Prayer Case*, <http://religionclause.blogspot.com/2006/09/7th-circuit-hears-arguments-in-indiana.html> (Sept. 8, 2006).

⁴⁴³ Schulcz, *supra* note 435, at 4 (“Religious speech provided at Navy functions must be ‘private speech’ since the Navy is forbidden from taking an active part in religion or providing its own religious speech.”). Mr. Schulcz represents the plaintiffs in *Larsen* and other cases involving evangelical Christians who are suing the Navy with respect to the current policies governing chaplains. Ken Walker, *5th Lawsuit by Navy Chaplains Adds to Discrimination Charges*, CHRISTIAN EXAMINER ONLINE (Aug. 2006), http://www.christianexaminer.com/Articles/Articles%20Aug06/Art_Aug06_08.html. See also *Larsen v. U.S. Navy*, 486 F. Supp. 2d 11 (D.D.C. 2007) (list of plaintiffs’ counsel).

⁴⁴⁴ See *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) (invalidating display of Ten Commandments because it had been undertaken for constitutionally forbidden purposes of promoting religious ideas).

⁴⁴⁵ For a detailed and nuanced examination of the context of speech by military officials, determining when such speech should be treated as official government speech, see Fitzkee & Letendre, *supra* note 4, at 36-43.

⁴⁴⁶ *Id.*; Complaint at 33, 43, 111, 118, 112, *Klingenschmitt v. Winter*, No. 1:106-cv-01832-HHK (D.D.C. 2006) [hereinafter *Klingenschmitt* complaint]; see also Schulcz, *supra* note 435, at 5. A similar claim has been raised in a recent lawsuit over restrictions on sectarian prayer in a city council. *Turner v. City Council of the City of Fredericksburg* (E.D. Va. 2007), available at <http://www.rutherford.org/PDF/turner%20complaint.pdf>.

nial prayer are formally neutral with respect to all denominations. No person may pray using the distinctive terms of a particular faith group, and especially the distinctive name for the faith group's understanding of divinity.⁴⁴⁷ Muslims, Jews and Christians of all stripes are equally bound by the regulation. It is undoubtedly true that some find it easier to work within such restrictions, while others experience the restrictions as unreasonable constraints. The same could be said, however, of the chaplaincy's fundamental expectations of pluralism.⁴⁴⁸ Not all ministers or faith groups are willing to accept the limitations on ministry imposed by the norm of pluralism, even in its more pragmatic form. Their unwillingness to accept the restrictions of pluralistic ministry does not transform the chaplaincy's norm into a forbidden discrimination.

The other claim of religious liberty, advanced by the defenders of sectarian prayer at military ceremonies, relies on the Religious Freedom Restoration Act (RFRA).⁴⁴⁹ Proponents of this position assert that the restrictions on ceremonial prayer impose a substantial burden on the religious liberty of chaplains, and that the burden is not justified as the least restrictive means to achieve a compelling government interest.⁴⁵⁰ It is unlikely that a court would find the restriction on prayer to be a substantial burden on free exercise, because the military regulations already excuse any chaplain from participating in ceremonial prayers if such prayers are inconsistent with the chaplain's religious beliefs.⁴⁵¹ Such opt-outs have always been deemed a sufficient means for addressing both free exercise and free speech concerns about government-compelled speech.⁴⁵² The only cases in which opt-outs have been found constitutionally insufficient involve practices that violate the Establishment Clause, such as prayer in public schools.⁴⁵³

In order to escape the dilemma of preferred opt-outs as a fully sufficient response to their concerns, those who oppose the restrictions on sectarian prayer at ceremonies contend that such restrictions violate the Establishment Clause by creating a preference for nonsectarian religion over sectarian religion.⁴⁵⁴ Any

⁴⁴⁷ SECNAV INSTR. 1730.7C, *supra* note 417 (rescinded Nov. 26, 2006), at sec. 6(c) ("Other than Divine/Religious Services, religious elements for a command function, absent extraordinary circumstances, should be non-sectarian in nature."). *See also* Dobosh, *supra* note 4, at 1560 (describing services' public prayer policies).

⁴⁴⁸ *See supra* notes 335-80 and accompanying text (discussing pluralism in the conduct of military chaplaincy).

⁴⁴⁹ *Klingenschmitt* complaint, *supra* note 446, at ¶¶ 125-130.

⁴⁵⁰ *Id.*

⁴⁵¹ *See, e.g.,* AR 165-1, *supra* note 10, at sec. 4.4.e. *See also* SECNAV INSTR. 1730.7C, *supra* note 417, at sec. 6(c) ("Once a commander determines a religious element is appropriate, the chaplain may choose to participate based on his or her faith constraints. If the chaplain chooses not to participate, he or she may do so with no adverse consequences.").

⁴⁵² *See, e.g.,* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

⁴⁵³ *Engel v. Vitale*, 370 U.S. 421, 430 (1962); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224-25 (1963).

⁴⁵⁴ *Klingenschmitt* complaint, *supra* note 446, ¶¶ 25-32.

attempt to define prayer along those lines, they argue, reflects governmental endorsement of a particular version of religious faith.⁴⁵⁵

This argument is closely related to the claim that ceremonial prayer must be treated as private speech in order to survive Establishment Clause scrutiny, and the argument suffers from the same fundamental defect. The defect is evident in proponents' reliance on *Lee v. Weisman*⁴⁵⁶ as authority for this argument.⁴⁵⁷ In *Lee*, the Supreme Court held unconstitutional a practice of nonsectarian prayer at public school graduation ceremonies.⁴⁵⁸ The Court ruled that the nonsectarian quality of the prayer was irrelevant; any form of government-sponsored prayer in public schools violates the Establishment Clause.⁴⁵⁹ The decision does not stand for the proposition that nonsectarian and sectarian prayer are legally indistinguishable in all contexts, and it certainly does not stand for the proposition that the defect in the practice rested in the school's failure to label the prayer as private speech. Instead, *Lee v. Weisman* reflects the Court's heightened sensitivity about the coercive effect of religious exercises in public schools.⁴⁶⁰ Outside that context, many courts have been willing to recognize a distinction between nonsectarian invocations and sectarian prayers, permitting the former but not the latter in public ceremonies.⁴⁶¹ Indeed the Supreme Court's decision in *Marsh v. Chambers*, which upheld against Establishment Clause challenge the practice of legislative prayer, suggested the importance of that distinction.⁴⁶²

The claim that non-sectarian and sectarian prayer are constitutionally indistinguishable—that either both are forbidden or both are permitted—ultimately fails for reasons deeply rooted in Establishment Clause norms. Ceremonial prayer in the military is most persuasively analogized to legislative prayer, a practice upheld by the Court in *Marsh v. Chambers*.⁴⁶³ In *Marsh*, plaintiffs challenged the existence of a paid chaplain for the Nebraska's state

⁴⁵⁵ Schulcz, *supra* note 435, at 3-4.

⁴⁵⁶ 505 U.S. 577 (1992).

⁴⁵⁷ Schulcz, *supra* note 435, at 3.

⁴⁵⁸ 505 U.S. at 598-99.

⁴⁵⁹ *See id.* at 589-90.

⁴⁶⁰ *Id.* at 592. *See also* Dobosh, *supra* note 4, at 1508-09 (describing coercion test from *Lee v. Weisman*).

⁴⁶¹ *See* Hinrichs v. Bosma, 440 F.3d 393 (7th Cir. 2006) (denial of stay). In denying a petition to stay an injunction imposed on the Indiana state legislature's practice of prayer, which included frequent sectarian invocations—and no policy against such invocations—the court drew a sharp line between sectarian and nonsectarian prayer in the legislative context. *Id.* at 398-402. The Rutherford Institute has aggressively advanced this position in its legal advice to local legislatures. *See* John Whitehead, Memorandum: Prayer at City Council Meetings: Analysis and Guidelines (October 2004), http://www.rutherford.org/PDF/10-15_Town_Council.pdf (last visited Sept. 5, 2007).

⁴⁶² *See* *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983).

⁴⁶³ *Id.* at 783.

legislature, and the legislature's practice of opening each day of the session with a prayer by the chaplain.⁴⁶⁴ The Court held that Nebraska's legislative chaplaincy did not violate the Establishment Clause, although the rationale for the holding is complicated and contested.⁴⁶⁵

Much of the Court's opinion in *Marsh* focused on the long history of the practice of legislative prayer, which had continued for over a century in Nebraska, tracking a similar pattern which had persisted since the beginning days of the federal legislature.⁴⁶⁶ The Court found that this history suggests that the drafters of the First Amendment did not regard legislative chaplaincies as religious establishments.⁴⁶⁷

The outcome in *Marsh* did not turn on history alone. The Court identified several features of the prayer – historical and present – that substantially mitigated concerns about religious establishments.⁴⁶⁸ First, the Court said that “the Founding Fathers looked at invocations as ‘conduct whose . . . effect . . . harmonized with the tenets of some or all religions.’ The Establishment Clause does not always bar a state from regulating conduct simply because it ‘harmonizes with religious canons.’”⁴⁶⁹ Although its explanation is not a model of clarity, the Court appeared to be arguing that legislative prayers should not be treated as religious activities, but as a solemnizing event that “harmonizes” with the religious activity of prayer. Second, the Court emphasized that those who claimed injury from the legislative prayer were adults, and, thus, “presumably not readily susceptible to ‘religious indoctrination.’”⁴⁷⁰ Third, the Court said that the content of prayer was not material to the constitutionality of the practice “where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.”⁴⁷¹

Taken together, these three features suggest the boundaries of the Court's reliance on history to uphold the practice of legislative prayer. Although lower courts have increasingly wrestled with application of these boundaries in a variety of legislative settings, from state legislatures to local school boards, these courts have also recognized that *Marsh* does not provide blanket justification for every practice that might be called “legislative prayer.”⁴⁷² Context has played an important role in these decisions. Courts

⁴⁶⁴ *Id.* at 784-85.

⁴⁶⁵ *See id.* at 792-95.

⁴⁶⁶ *Id.* at 786-92.

⁴⁶⁷ *Id.* at 792.

⁴⁶⁸ *Id.* at 793-95.

⁴⁶⁹ *Id.* at 792 (citations omitted).

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.* at 794-95.

⁴⁷² *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004); *Rubin v. City of Burbank*, 124 Cal. Rptr. 2d 867 (Ct. App. 2002).

have distinguished traditional public legislative assemblies, in which adult participants come and go freely, from settings such as meetings of public school boards, which schoolchildren may sometimes be required to attend.⁴⁷³ Courts have also examined the types of prayer offered, and a number of decisions have concluded that a pattern of sectarian prayers should be treated differently than the practice at issue in *Marsh*.⁴⁷⁴

This twofold concern about context and content guides application of *Marsh* to chaplains' prayers at military ceremonies. In sharp contrast to ordinary legislative assemblies, service members are typically commanded to attend military ceremonies, and, thus, do not have the option of avoiding prayer if they desire to do so.⁴⁷⁵ In this respect, service members more closely approximate schoolchildren, despite the difference in age.⁴⁷⁶ The fact that service members attend ceremonies under orders is also relevant to assessment of the prayers' content. *Marsh* suggested that legislative prayers would be constitutionally vulnerable if they were "exploited to proselytize or advance any one, or to disparage any other, faith or belief."⁴⁷⁷ A court might be unwilling to treat the simple coda "in Jesus' name" as exploitative in a legislative setting, where listeners are at liberty to excuse themselves, but the same phrase might be treated quite differently in prayer before a "captive audience."

The application of *Marsh* to the context of military ceremonies underscores the implausibility of the claim made by proponents of sectarian prayer that such prayers are indistinguishable from non-sectarian prayers. That claim assumes that both sectarian and non-sectarian prayers constitute religious activities. *Marsh* and its lower court progeny, however, depend on the finding that, at least in some circumstances, prayers are not religious activities but secular activities that "harmonize" with common religious practices.⁴⁷⁸ The three features identified by the Court in *Marsh* focus on the extent to which legislative prayer resembles a religious activity, including the purpose of the prayer's message and

⁴⁷³ *Coles ex rel. Coles v. Tracy*, 171 F.3d 369 (6th Cir. 1999) (striking down school board prayer); *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 F. App'x 355 (9th Cir. 2002) (unpublished order) (striking down school board prayer).

⁴⁷⁴ *Compare Wynne*, 376 F.3d at 292 (striking down practice of sectarian prayer), with *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005) (upholding practice of nonsectarian prayer, but permitting board to deny invitation to Wiccan practitioner because no general invitation is extended to the public).

⁴⁷⁵ Dobosh, *supra* note 4, at 1532-34; Wildhack, *supra* note 4, at 246.

⁴⁷⁶ The Court in *Lee v. Weisman*, 505 U.S. 577, 592 (1992), emphasized the coercive effect of the prayers, even at a formally optional event like a middle school or high school graduation. The coercive effect of prayer upon service members compelled to attend a ceremony is obviously stronger than that involved in *Lee*. See also *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003) (enjoining supper prayer at Virginia Military Institute on grounds of its coercive effect on cadets). See Dobosh, *supra* note 4, at 1513-17 (discussing *Mellen*). See also Wildhack, *supra* note 4, at 245-46 (discussing conduct of chaplains at effectively mandatory events).

⁴⁷⁷ 463 U.S. 783, 795 (1983).

⁴⁷⁸ See *Simpson*, 404 F.3d at 282-83 (discussing *Marsh*, 463 U.S. at 792).

the experience of the audience.⁴⁷⁹ The more the practice resembles a normal religious event, the less likely the practice will withstand challenge under the Establishment Clause. Seen in that light, the practice of sectarian prayer at military ceremonies is far more constitutionally vulnerable than most legislative prayer.

Even if sectarian prayer at military ceremonies does not represent a categorical violation of the Establishment Clause, the possibility that it might be such a violation generates discretionary authority in the military to forbid prayer of that character. Under *Marsh*, sectarian prayer that is “exploited to proselytize or advance any one . . . faith or belief”⁴⁸⁰ at ceremonies would violate the Establishment Clause. The concern to guard against violation of that standard would provide the military with a zone of discretion, in which courts would be highly unlikely to second-guess determinations of the appropriate content for such prayers, especially given the “captive audience” for ceremonial prayers in the military setting.⁴⁸¹

A variety of powerful constitutional themes—the anti-coercion concern expressed in *Lee*,⁴⁸² the boundaries of ceremonial prayer suggested in *Marsh*⁴⁸³ and the deference to military authorities with respect to religion as expressed in *Goldman*⁴⁸⁴—thus coalesce to support a military policy precluding sectarian prayer at ceremonies. Whatever “burdens” such a preclusion may impose on the religious liberty interests of chaplains, anti-coercion concerns for service members in attendance and respect for Establishment Clause norms amply satisfy RFRA’s requirement of compelling interests as well as any constitutionally-based requirement to justify such a preclusion.⁴⁸⁵

In addition, the policy of “minimal religious pluralism,” discussed above, provides yet one more reason to restrict sectarian prayer in ceremonial settings which service members are obliged to attend.⁴⁸⁶ Indeed, all the arguments for minimal pluralism, and against a theory of chaplains’ rights that would undercut such pluralism, are far stronger in the setting of ceremonial prayer than in the context of worship services. For that reason, the suggestion

⁴⁷⁹ *Marsh*, 463 U.S. at 786, 790-92 (emphasizing traditional and ceremonial attributes of practice, and stressing absence of proof that prayers were “exploited” to advance particular religious beliefs).

⁴⁸⁰ *Id.* at 792.

⁴⁸¹ See *Larsen v. U.S. Navy*, 486 F. Supp. 2d 11, 25-30 (D.D.C. 2007) (invoking deferential standard from *Goldman v. Weinberger*, 475 U.S. 503 (1986), to assess constitutional claims raised by chaplains).

⁴⁸² See generally *Lee v. Weisman*, 505 U.S. 577 (1992).

⁴⁸³ See generally *Marsh*, 463 U.S. at 783.

⁴⁸⁴ See generally *Goldman*, 475 U.S. 503.

⁴⁸⁵ See, e.g., *Locke v. Davey*, 540 U.S. 712, 730 (2004) (Scalia, J., dissenting) (government has a compelling interest in avoiding Establishment Clause violations) (citing *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)).

⁴⁸⁶ See *supra* notes 362-68 and accompanying text (discussing minimal pluralism).

that the problem of sectarian prayer can be solved by permitting service members who object to such prayer to “opt-out” of the relevant ceremonies seems profoundly misplaced. The military inevitably must choose between chaplains’ interests to pray as they choose in official ceremonies and service members’ rights to not be driven from those ceremonies by hostile or alienating religious sentiments. Along with considerations of law, the concern for religious pluralism and the accompanying spirit of unity that the military seeks to inspire point strenuously in favor of a restriction on sectarian prayer in these settings.⁴⁸⁷

3. Pastoral Care

Issues of religious discrimination, pluralism and sectarian public prayers have captured significant public attention, but the practice of pastoral care by military chaplains might prove to be even more constitutionally sensitive and complex.⁴⁸⁸ Pastoral care encompasses a broad range of encounters between clergy and others, and these encounters may occur in an equally broad range of settings.⁴⁸⁹ Chaplains visit the sick or injured in hospitals, engage in formal counseling sessions with service members and their families, hear private confession from congregants, talk informally with soldiers as they ride along on a convoy or share a meal at a forward operating base, or sit with a colleague over coffee in a headquarters office building.

The diverse contexts of pastoral care give rise to the constitutional complexity of the practice because a model of such care appropriate in one setting may be legally problematic in another. Consider two common occasions for pastoral care. In the first, a service member visits the post chapel on a large domestic installation and makes an appointment with a specific chaplain, one of six clergy of different and clearly identified faiths on the chapel staff. In the second, a military hospital chaplain visits the room of an injured service member to determine the patient’s religious needs. Under normal circumstances, the first chaplain can reasonably assume that the service member scheduled the appointment because of the chaplain’s distinctive religious commitments. The chaplain’s care might involve religious instruction and—if the service member did not share the chaplain’s faith, or did not embrace it with full intensity—perhaps even efforts at religious persuasion. Such a robust religious encounter between chaplain and service member fits perfectly within the model of religious accommodation. The service member selected this particular opportu-

⁴⁸⁷ See Fitzkee & Letendre, *supra* note 4, at 5-6; Wildhack, *supra* note 4, at 247, 247 n.199 (on unit cohesion).

⁴⁸⁸ See HUTCHESON, *supra* note 238, at 62-64.

⁴⁸⁹ The armed services include a range of pastoral care tasks within the specified duties of chaplains. AF INSTR. 52-101, *supra* note 253, at sec. 4; AR 165-1, *supra* note 10, at sec. 4-4.k.; OPNAV INSTR. 1730.1D, *supra* note 10, at sec. 5.b.(4). On pastoral care more generally, see HOWARD JOHN CLINEBELL, BASIC TYPES OF PASTORAL CARE AND COUNSELING: RESOURCES FOR THE MINISTRY OF HEALING AND GROWTH (Abingdon Press 1984).

nity for religious experience from a menu of choices, and did so in a context that appears to minimize the risk of exploitation.

In the second context, however, the model of robust religious encounter sits uneasily with the constitutional structure of religious accommodation. The injured service member is not likely to have selected this particular chaplain, and the hospital setting suggests the possibility that the service member might be especially vulnerable to attempts at religious indoctrination or influence. In this context, the military must require chaplains to adopt a model of pastoral care that affords heightened protection for the service member. Such a model, reflected in the standards for Clinical Pastoral Education (CPE), emphasizes the responsive character of pastoral care.⁴⁹⁰ The chaplain elicits and develops the patient's own religious commitments, rather than imposing on the patient the religious views of the chaplain.

Indeed, every court that has considered a constitutional challenge to a hospital chaplaincy program has approved of the CPE model of responsive care and has suggested the constitutional infirmity of a model that would permit proselytizing by chaplains. In *Baz v. Walters*,⁴⁹¹ the Seventh Circuit rejected an employment discrimination claim brought by a former chaplain in the Veterans Administration hospital system.⁴⁹² The chaplain claimed, among other things, that the hospital dismissed him from his position because he refused, on religious grounds, to conform to the "institutional theology" of pastoral care established by the Department of Veterans Affairs (VA).⁴⁹³ This institutional theology, he argued, prohibited him from engaging in the explicitly evangelical outreach to patients that his faith required.⁴⁹⁴ The court rejected his claim and said that the VA's restrictions on his chaplaincy were constitutionally required:

[T]he V.A. must ensure that the existence of the chaplaincy does not create establishment clause problems. Unleashing a government-paid chaplain who sees his primary role as proselytizing upon a captive audience of patients could do exactly that. The V.A. has established rules and regulations to ensure that those patients who do not wish to entertain a chaplain's ministry need not be exposed to it. Far from defining its own institutional theology, the medical and religious staffs at Danville are

⁴⁹⁰ See *Carter v. Broadlawns Med. Ctr.*, 667 F. Supp. 1269, 1272-73 (S.D. Iowa 1987), *aff'd in part, modified in part*, 857 F.2d 448 (8th Cir. 1988) (describing CPE model of pastoral care). See also *Freedom from Religion Found. v. Nicholson*, 469 F. Supp. 2d 609, 612-13 (W.D. Wis. 2007) (describing CPE model); HUTCHESON, *supra* note 238, at 63-64 (CPE and military chaplaincy).

⁴⁹¹ 782 F.2d 701 (7th Cir. 1986).

⁴⁹² *Id.* at 709.

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* at 705, 709.

merely attempting to walk a fine constitutional line while safeguarding the health and well-being of the patients.⁴⁹⁵

The Eighth Circuit reached a similar conclusion in *Carter v. Broadlawns Medical Center*,⁴⁹⁶ which involved an Establishment Clause challenge to a public hospital chaplaincy program.⁴⁹⁷ The court ruled that the chaplaincy program did not violate the Establishment Clause because the chaplain's role was designed to accommodate the religious needs of hospital patients and their families.⁴⁹⁸ In reaching its conclusion, the court emphasized the CPE model of pastoral care in which "the religious content in [the chaplain's] services to a patient depended entirely on the patient's pre-existing preferences."⁴⁹⁹ The court also stressed the important role played by the paid chaplain in "supervis[ing] the volunteer chaplains to make sure they abide by the non-proselytization principles of C.P.E."⁵⁰⁰

Most recently, in *Freedom From Religion Foundation v. Nicholson*,⁵⁰¹ a federal district court rejected an Establishment Clause challenge to the VA healthcare chaplaincy program.⁵⁰² The complaint alleged that the VA unconstitutionally integrates religion into all aspects of its healthcare, and that it does so through the chaplaincy's systematic engagement with each patient admitted to the hospital system.⁵⁰³ The court dismissed the lawsuit because it determined that the chaplaincy program represented a constitutionally legitimate accommodation of the free exercise needs of patients in VA facilities.⁵⁰⁴ As in *Baz* and *Carter*, the court emphasized the structure and limitations of the CPE model chaplaincy and found the VA's embrace of that model to be constitutionally dispositive.⁵⁰⁵ CPE-trained chaplains, the court found, assist patients to develop the patients' own religious beliefs and spiritual resources rather than "initiating or guiding religious instruction."⁵⁰⁶ Moreover, the VA's CPE-trained chaplains "are proactive in eliminating proselytizing from their hospitals. As such, VA pastoral care is religious in content only if that is the wish of a given patient."⁵⁰⁷

⁴⁹⁵ *Id.* at 709.

⁴⁹⁶ 857 F.2d 448 (8th Cir. 1988).

⁴⁹⁷ *Id.* at 450.

⁴⁹⁸ *Id.* at 456-57.

⁴⁹⁹ *Id.* at 455.

⁵⁰⁰ *Id.* at 456.

⁵⁰¹ 469 F. Supp. 2d 609 (W.D. Wis. 2007). See our analysis of this decision at the RT website: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=55.

⁵⁰² *Nicholson*, 469 F. Supp. 2d at 621-22.

⁵⁰³ *Id.* at 612-16.

⁵⁰⁴ *Id.* at 619-23.

⁵⁰⁵ *Id.* at 621-23.

⁵⁰⁶ *Id.* at 613.

⁵⁰⁷ *Id.* at 613, 622-23.

These first two settings of pastoral care—the large base chapel and the military hospital—represent opposite ends of a spectrum, with maximal religious choice and minimal vulnerability at one end, and minimal choice and heightened vulnerability at the other. Between these two poles, however, lie much more difficult questions about the practice of pastoral care. Consider two additional and equally common situations. In the third, a service member and her husband, who are having marital difficulties, visit the base Family Life Center, which offers trained pastoral counseling and support groups.⁵⁰⁸ The service member's unit commander suggested that she seek help from the Center because her family trouble was interfering with her work. In the fourth, a service member seeks the counsel of his unit chaplain who is deployed with the unit in a remote operating base in Iraq.

The third setting—the Family Life Center—offers a number of features found in each of the first two settings. On the one hand, the service member visits the pastoral counselor voluntarily, and we might reasonably presume that other opportunities or resources for marital counseling are available within the community. On the other hand, the Center may hold itself out as a religiously inclusive service provider more akin to a healthcare facility than a chapel, and so the service member's encounter with a particular chaplain should not be taken as acceptance of religious content that chaplain might offer. Moreover, the specific need for counseling—especially on recommendation of a superior—might indicate some degree of vulnerability to religious influence, though perhaps not to the extent present in the hospital setting.

We would expect a military pastoral counseling center to resolve this uncertainty through specific guidance for chaplains on the content of their care. Such guidance might include formal agreements with potential clients about the character and extent of religious language and commitments in the counseling sessions, or other mechanisms to ensure that clients directed the religious content. Within the constitutional framework of accommodation, even thickly religious counseling may be appropriate so long as the recipients of such counseling have given meaningful consent to receiving it.

The fourth setting shares the ambiguities present in the third, although in a significantly different context. As in the first example, the service member visits the chaplain voluntarily with full awareness of the chaplain's religious identity. However, the parallels with the first example end at that point. In a remote area, the service member who wishes to confide in a chaplain is not likely to have a great deal of choice; unless he waits for the occasional visit of clergy of different faiths to provide formal worship, the service member will have contact only with the unit's assigned chaplain.⁵⁰⁹ The service member, of

⁵⁰⁸ For an example of programs at one such facility, see the website for the Fort Wainwright Chaplain Family Life Center: <http://www.wainwright.army.mil/FWAFLC/>.

⁵⁰⁹ See generally Kristin Henderson, *Chaplains at War*, WASH. POST MAG. (April 30, 2006), at W04 (describing daily life for deployed chaplains in Iraq). See also Gregory J. Darr, *For God & Country: The Constitutional Question of the U.S. Army Chaplaincy*, MIL. CHAPLAINS' REV. 95,

course, may happen to share that chaplain's faith tradition, in which case this setting more closely approximates the first. It is more likely, however, that the service member and chaplain will not be of the same faith group.⁵¹⁰ The special vulnerability associated with likely exposure to combat magnifies concern for the service member, and brings this setting closer to that of chaplaincy in a hospital environment.

Moreover, in contrast to the first three settings, this one presents a special challenge because of the difficulty of formalizing or monitoring the relationship between chaplain and service member. The relationship may have pre-existed the situation of danger, but it may well have arisen swiftly in contemplation of that danger, and it may take place in a hurried and completely unsupervisable setting.

The fourth setting accordingly presents a unique and excruciating constitutional dilemma. The temporal and spatial likelihood of grave physical danger, the absence of a service member's choice of particular faith affiliation on the part of the chaplain, and the lack of formal supervision cumulatively present a significant risk of unwanted religious persuasion in this context. At the same time, however, some service members in this situation may experience a longing, however articulated, for explicit, detailed religious inspiration and support. Faced with this dilemma, a military that imposed an outright ban on religious persuasion by chaplains in this setting would protect vulnerable service members from exploitation while simultaneously undermining the religious options of service members seeking deep and sustained religious counsel at a moment of personal truth.

In light of the constitutional sensitivities at either pole of this problem, it is both remarkable and disquieting that the armed forces currently provide no meaningful guidance to chaplains on how to respond in this context of pastoral care. A chaplain in a deployed setting would violate no current military chaplaincy regulations by offering aggressive religious counsel, including explicit efforts at conversion or inculcation of particular religious views, to troops who sought pastoral care, even though such proselytizing is clearly prohibited by the standards of CPE practice, and seems to be a condition of the constitutionality of healthcare chaplaincy programs.⁵¹¹

The military's failure to adopt guidelines for pastoral care is understandable in political terms, given the turmoil occasioned by the services' promulgation of rules governing sectarian prayer at military ceremonies.⁵¹² Some chaplains' endorsing organizations and political groups, arguing that proselytiz-

101-02 (Winter 1992) (on forward deployment of Army chaplains); HUTCHESON, *supra* note 238, at 84-85 (provision of chaplains in smaller units).

⁵¹⁰ Phillips, *supra* note 239, at 4-5.

⁵¹¹ See *supra* notes 490-507 and accompanying text (discussing decisions involving public healthcare chaplaincy programs).

⁵¹² See *supra* notes 415-30 and accompanying text (discussing furor over Air Force and Navy proposals to prohibit sectarian prayer at military ceremonies).

ing is an essential part of their religious ministry, would inevitably attack any rule that prohibited or limited chaplains from using aggressive religious persuasion in these situations.⁵¹³

But the strategy of avoidance in this context is not constitutionally defensible. In contrast to ceremonial prayer, which always occurs in the openness of public gatherings, the practice of pastoral care takes place in private, and often in situations of great emotional and spiritual distress. That distress renders those who seek pastoral care vulnerable to undue influence or even exploitation.

In such circumstances, the issuance of constitutionally appropriate guidelines would be salutary. A set of adequate guidelines would explicitly recognize the dilemma presented by pastoral care on the battlefield, and recognize as well the inevitably interactive quality of pastoral counseling in that setting. A service member seeking a bit of religious guidance may end up getting far more than he bargained for, while others may be ill-served by a chaplain's reticence to fully engage the religious dimensions of the moment. Pastoral care by military chaplains is justified as a religious accommodation for the needs of service members, but the administration of that practice must be responsive to those needs—including needs borne of their particular vulnerability in the very settings that call for the existence of the chaplaincy. At the very least, the military should prohibit pro-active, chaplain-initiated religious persuasion by chaplains in any context in which service members might be regarded as both vulnerable and deprived of adequate choice of religious confidant.⁵¹⁴ As in the CPE model of pastoral care, the structure of accommodation demands a carefully calibrated degree of reticence on the part of chaplains. They may share their own faith if invited by the service member, but pastoral care should not be seen as an opportunity to evangelize. Pastoral care, like other aspects of the military chaplaincy, exists for the purpose of serving the religious needs of service members as those needs are expressed by the service members themselves.

Guidelines and training for pastoral care at the frontier of danger should thus explicitly point chaplains and their supervisors in the direction of sensitive appraisal of a service member's religious background and self-articulated spiritual needs. Under such a regime, which neither banned nor explicitly invited

⁵¹³ The arguments made in defense of sectarian prayer at military ceremonies would apply with equal—and perhaps even greater—force to the context of pastoral care. Although public invocations at official ceremonies may plausibly be construed as “secular” acts, the conduct of pastoral care resists any such construal. The “pastoral” quality of a chaplain’s counsel reflects its religious character, which distinguishes the care from standard secular counseling or therapy. Mandatory embrace of the CPE model’s religious pluralism would seem to reflect even more an “establishment” of a particular religious view, and constraint on chaplains’ religious liberty, than the brief non-sectarian prayers of military ceremonies. Nonetheless, the arguments offered by opponents of the CPE model are unlikely to be any more successful than opponents of CPE in the healthcare chaplaincy context, or than the opponents of the services’ policies for public prayer.

⁵¹⁴ In *Katcoff v. Marsh*, the court accepts and relies on the military’s representation that proselytizing is prohibited, though such a prohibition is not clearly reflected in any military regulation. 755 F.2d 223, 228 (2d Cir. 1985).

religious persuasion, service members would be neither deprived of desired religious support nor exploited at a moment of maximum physical and spiritual vulnerability. Instead, chaplains would be instructed to put the religious needs and desires of service members, rather than the chaplain's own view of the path to salvation, at the forefront of the mission of pastoral care. As we see it, this is a generic norm in the context of pastoral care, but it has acute and special force on the battlefield.

VI. CONCLUSION

At the outset of this paper, we suggested that the multiplicity of Establishment Clause tests and standards had led many courts and commentators astray in their approach to the military chaplaincy. As time and circumstances have repeatedly revealed, the law of the Establishment Clause cannot be boiled down to a single test or standard. Instead, the Supreme Court's decisions in the field cluster around a set of such tests or standards, each appropriate to its own particular context.

The military chaplaincy can best be appraised through the legal prism of permissive accommodation. When the institution is so viewed, its basic features appear to fit comfortably within our constitutional tradition. Various aspects of the institution, however, require close and careful consideration of a variety of constitutional and statutory concerns. These concerns do not always point in the same direction. We remain convinced, however, that both the overarching and particularistic evaluation of the chaplaincy can be accomplished effectively only within the framework of permissive accommodation of religion, and with the regard for military judgment that follows from application of that framework.

As is true of much of military life, the interests of individuals must be frequently subordinated to overarching concerns of the armed forces as an institution. Thus, many—though not all—complaints by chaplains about restrictions on the time, place, or content of their religious expression are without merit. The individuals whose interests are to be preserved in the context of the chaplaincy are those service members whose religious experience depends on a vibrant, yet appropriately obedient, corps of chaplains.

